The RFRA Revision of the Free Exercise Clause

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I. INTRODUCTION

On November 16, 1993, President Clinton signed into law the Religious Freedom Restoration Act (RFRA).[1] He proclaimed that RFRA

> reverses the Supreme Court's decision [in] Employment Division against Smith, and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.[2]

The *Smith* Court had given an exceedingly narrow interpretation to the Free Exercise Clause of the First Amendment, literally removing from its protective umbrella most if not all substantial burdens on religious exercises imposed by neutral and generally applicable laws.[3]

The President's appraisal of RFRA as a statute designed to "reverse" a Supreme Court opinion, and to "reestablish" a "better" judicial standard for assessing certain Free Exercise Clause claims, echoed similar sentiments expressed during the congressional development of RFRA.[4] Such sentiments

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[1] 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

[2] Remarks on Signing the Religious Freedom Restoration Act of 1993, II PUB. PAPERS 2000 (Nov. 16, 1993). The President also thanked the chaplains of the House and Senate and especially the Coalition for the Free Exercise of Religion, which played a "central role" in drafting the legislation and working for its passage. The Senate adopted the RFRA bill by a 97-to-3 vote, while the House approved by a voice vote. *Id.*

[3] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades . . . [but] *Smith* is contrary to the deep logic of the First Amendment.").

[4] For example, the Senate Judiciary Committee's definitive report recommending passage of the bill that became RFRA openly announced that "the purpose of this Act is only [sic] to overturn the Supreme Court's decision in *Smith*." S. REP. NO. 111, 103d Cong., 1st Sess. 12 (1993) [hereinafter SENATE REPORT].

In the House Judiciary Committee's corresponding report, Congressman Henry J. Hyde's "additional views" stated that the purpose of RFRA "is to overturn the 1990 decision of the United States Supreme Court in Oregon Employment Services Division v. Smith 494 U.S. 872," and "to replicate the 'compelling state interest test' for the adjudication of free exercise claims which was in place prior to the Supreme Court's decision in *Smith*." H.R. REP. NO. 88, 103d Cong., 1st Sess. 14 (1993) [hereinafter HOUSE REPORT] (providing additional views of Congressman Hyde and others).

RFRA on its face does not pretend to "reverse" or "overrule" *Smith*. Its only stated purpose is "to restore [by statute] the compelling interest test," as set forth in pre-*Smith* decisions. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993). Or, as Congressman Hoyer put it,

sprang from an almost universal displeasure with the Court's *Smith* ruling among religious groups, civil libertarians, and academics.[5] Torrents of legal criticism were launched at the decision.[6] Agreeing that the Court had done grave damage to the jurisprudence of the Free Exercise Clause by limiting its protection only to laws targeting religion, Congress joined the hue and cry against *Smith* and enacted RFRA.

Seldom has Congress been inspired to express such quick indignation and displeasure with a constitutional decision of the Supreme Court or been so eager to overturn the substance of such a decision.[7] And never has Congress enacted a statute imposing on the federal and state judiciary an obligation to disregard a mode announced by the Supreme Court for interpreting and applying a constitutional provision and to replace it with what Congress thinks is a "better" interpretive approach.

If those are the true purposes, design, and effect of RFRA, then critical constitutional questions emerge. Has Congress breached the wall of separation between legislative and judicial power? Can Congress statutorily rewrite the Free Exercise Clause in a manner contrary to the meaning given the Clause by the Supreme Court? And can Congress then dictate to the courts, both state and federal, and including the Supreme Court, the judicial standard of review or the degree of judicial scrutiny to be applied in all judicial proceedings involving a claim or defense alleging a violation of the congressional rewrite of the Free Exercise Clause? Or, as Congressman Hyde asked during the RFRA legislative hearings, do "we in Congress have the right to tell the [Supreme] Court what standard of review it shall use on first amendment cases . . . ?"[8]

RFRA is a way by which "we can undo the harm of the Supreme Court decision in Smith." 139 CONG. REC. H8715 (daily ed. Nov. 3, 1993). But "reversing" or "overruling" *Smith*, and undoing the "harm" resulting from its interpretation of the Free Exercise Clause, are precisely the purpose, design, and effect of RFRA.

[5] Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5 (1994); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994); Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 821–22 (1994).

[6] *See generally* McConnell, *supra* note 3; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

[7] Congress not infrequently acts to override Supreme Court decisions construing federal *statutes*. *See, e.g.*, William M. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992). Attempts to override constitutional interpretation are a different matter entirely. *See infra* part VI.D.

[8] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the*

The ultimate question is whether RFRA represents a congressional intrusion upon the core function of the Supreme Court to interpret and apply the Constitution in the course of deciding cases or controversies that arise under the Constitution. It is precisely within that Article III case or controversy context that John Marshall "emphatically" asserted that it is "the province and duty of the judicial department to say what the law is."[9]

To answer those questions, we must first reread the Free Exercise Clause and note the ways in which the Court gives substance to it. We examine the nature of the so-called balancing test and the Court's use of that test in Free Exercise Clause jurisprudence. Then we review the *Smith* decision as a judicial exercise in reading and applying the Clause. We pay particular attention to the Court's refusal to follow in *Smith* what Congress has deemed to be the "better" interpretive approach to the Free Exercise Clause—i.e., to require government to prove a compelling governmental interest in enacting a neutral law and to balance that interest against the burden on religious exercise. Next we examine RFRA itself, its partial rewrite of the Free Exercise Clause, and how it interfaces or conflicts with the interpretive techniques employed by the Court in *Smith*. Finally, we address the constitutional implications of RFRA, particularly in light of the separation of powers doctrine.

Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong., 2d Sess. 100 (1992) [hereinafter *House Committee Hearings*].

ACLU President Nadine Strossen, without identifying any particular constitutional provision and relying instead on so-called "constitutional law shorthand," attempted to answer Congressman Hyde's question in these terms:

> Congress, of course, does that all the time. When it passes statutes which are to be enforced by the courts, it is always imposing, indeed in many situations, much more detailed standards for judicial enforcement. Here the general compelling State interest test is simply constitutional law shorthand for telling the Court you have got to treat religious freedom as a fundamental right. What that translates into in actual adjudication is that any abridgement on such a right is subject to strict scrutiny. So, in fact, it is a rather modest specification of the judicial review approach.

Id. Congressman Hyde did not offer or receive any satisfactory answer to his question, even in his separate statement accompanying the HOUSE REPORT, *supra* note 4.

[9] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Court has often repeated this assertion of judicial supremacy in the context of Article III cases and controversies. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the ultimate responsibility of this Court to act as the ultimate interpreter of the Constitution."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("This [*Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

II. THE NATURE OF THE FREE EXERCISE CLAUSE

Understanding the constitutional problems associated with the *Smith* decision, as well as with RFRA, first requires a reading of the Free Exercise Clause of the First Amendment: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[10] This prohibition applies to the states by incorporation into the "liberty" component of the Due Process Clause of the Fourteenth Amendment.[11]

The sparse language of the Free Exercise Clause makes it one of the many majestic generalities of the Constitution. The questions of what is "free exercise," what is "religion," or what is a law "prohibiting" free exercise, find no answers in the wording of the Clause.[12] Nor does the Clause tell us whether the critical word "law" refers not only to a law that targets the exercise of religion but also to "neutral and generally applicable" laws that only incidentally but substantially burden religious exercise.[13] We get no guidance from the Clause as to how to interpret those few words, or what standard of review or degree of scrutiny applies to a "law prohibiting" free exercise. The Clause itself leaves us in the dark as to whether we should balance the burden on the individual's free exercise rights against some demonstrated and compelling governmental interest in enacting and enforcing such a "law."

One final interpretive problem emerges: What remedy does the Clause provide? Does it contemplate or require courts to grant religious exemptions from neutral and generally applicable laws that substantially affect or burden religious exercises?[14] The face of the Clause, of course, offers no clue as to the

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[10] U.S. CONST. amend. I.

[11] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment . . . . The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[12] In Reynolds v. United States, 98 U.S. 145, 162 (1879), the earliest free exercise case, the Court observed: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted." For a discussion of the meaning of the word "prohibiting," see Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (holding that a law must coerce in order to constitute a burden on religious exercise).

[13] Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 184–85 (1992).

[14] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

answer to that query.

Thus the Free Exercise Clause is not one of those constitutional provisions, like the Article I, Section 3 provision that the Senate of the United States "shall be composed of two Senators from each State," that are self-defining and self-executing. The Clause cries out for interpretation. There are differing ways to give meaning to the Clause, dependent on the interpretive techniques and constitutional philosophy employed by the Court.[15] But in the hands of the judiciary, the resulting interpretations become living and substantive parts of the Clause itself. That the interpretations may change or develop over time is but a reminder that "the content of constitutional immunities is not constant, but varies from age to age."[16] So it is with the Free Exercise Clause.

III. THE NATURE OF THE BALANCING TEST

In our constitutional system, the answers to all the foregoing questions are emphatically left to the judiciary and to the Supreme Court in particular, acting in its Article III capacity as the supreme arbiter and interpreter of the words of the Constitution.[17] But to perform that high function and to read meaning into

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[15] Interpretation and philosophy will reflect, inter alia, the Court's underlying political theory, its understanding of national and constitutional history, and varying definitions of its institutional role. *See generally* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 80 (1995); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

[16] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 82–83 (1921). Cardozo, after quoting John Marshall's "mighty" phrase that "we must never forget that it is a *constitution* we are expounding," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), further wrote:

> A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.

CARDOZO, *supra*, at 83–84.

The interpretive variation over time is inevitable because, as Justice Frankfurter wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring).

[17] In Katzenbach v. Morgan, 384 U.S. 641, 656 (1966), Justice Brennan suggested that Congress might also have the authority to give substantive meaning to constitutional provisions: "[I]t is enough that we perceive a basis upon which Congress might predicate a

such generalities as the Free Exercise Clause, the Court perforce must select from various doctrinal methods of interpretation.[18] Such established methods include textual and literal reading of relevant provisions, structural analysis, doctrinal and prudential analysis, use of precedent, concern for practical consequences of a particular reading, examination of the history and tradition surrounding a provision, searching for the framers' intent of a provision or its original meaning, use of categorization and classification, recognizing and perhaps prioritizing certain fundamental values and rights, balancing competing constitutional values, and balancing individual rights as against governmental interests.[19]

The constitutional answers that these techniques produce depend largely on the weight the Court may intuitively give to one or more of these modes of interpretation. When the interpretive process employs a categorical approach, for instance, it draws the dividing line between laws that fall outside the reach of a constitutional provision and laws within the provision's protective reach. Under such an analysis, the Court may announce a "categorical absolute" that tolerates no governmental regulation whatever. The Court created just such a per se rule in its earliest free exercise case,[20] where it held that the Constitution protects "first and foremost, the right to believe and profess whatever religious doctrine one desires."[21]

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judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." But this comment has been severely limited by subsequent cases, and has never been used as the basis for Congress' authority to enact legislation that directly contradicts a Supreme Court decision. *See infra* part VII.B. for further discussion.

[18] "Because judicial power resides in the authority to give meaning to the Constitution, the debate [about vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies] is really a debate about how to read the text, about constraints on what is legitimate interpretation." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

[19] *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 289–318 (1986).

[20] In Reynolds v. United States, 98 U.S. 145, 164 (1879), the Court, after examining Jefferson's and Madison's concerns about governmental intrusions on religious beliefs, concluded that the Free Exercise Clause categorically deprived Congress of "all legislative power over mere opinion, but . . . left [Congress] free to reach actions which were in violation of social duties or subversive of good order."

[21] Employment Div. v. Smith, 494 U.S. 872, 877 (1990). Another example of a categorical absolute emerging from the Court's reading of an amorphous constitutional provision, the so-called negative Commerce Clause, is the "per se" rule of invalidity of state legislation that on its face and in effect discriminates against interstate commerce; this "per se" rule renders unnecessary any balancing of the state interest in burdening such

Our prime concern here is with the interpretive technique by which courts balance an individual right, such as the right freely to exercise one's religion, against some compelling governmental interest in circumscribing or outlawing the individual right.[22] This is generally known as the "balancing test," or, as RFRA describes it, the "compelling interest test."[23] Like all other interpretive techniques, the balancing test is of judicial creation, finding no explicit support in constitutional text.[24]

Balancing is a fairly late-comer in the arsenal of interpretive techniques,

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commerce. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

Such a per se or categorical absolute is a normative principle since it is "the expression of the Court's judgment as to whether the statute is compatible with the standard which the Court has found or read into the Constitution." Irving A. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U. L. REV. 656, 671 (1977).

[22] *See infra* notes 25–28 and accompanying text. Professor Louis Henkin has incisively noted that there are two kinds of balancing tests in the constitutional interpretive sense. One type of balancing is used to resolve perceived tensions between competing constitutional provisions, such as between the Establishment Clause and the Free Exercise Clause or between property rights and freedom of expression. Balancing the interests involved in the competing provisions, in Henkin's view, becomes a matter of constitutional interpretation or construction. On the other hand, Henkin defines another kind of balancing as a constitutional doctrine, applicable where a constitutional provision, like the Free Exercise Clause, is read not as an absolute but as declaring conditional prohibitions that can be divined only by balancing private rights and public good. Henkin, *supra* note 15, at 1046–47. Our discussion here primarily involves the second kind of balancing defined by Henkin, i.e., the judicial balancing between the substantive rights to religious exercise and the public need to limit or regulate them.

For an excellent discussion of the balancing technique, including its history and its merits and demerits, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[23] In the vast body of free exercise case law, and for purposes of this Article, the terms "balancing test," "compelling interest test," and "strict scrutiny" are used interchangeably. Strict scrutiny is the highest standard of judicial review, the most exacting scrutiny a court can give a law in measuring its constitutionality. It requires that the government prove that its action is the least restrictive alternative in furtherance of a compelling interest. In some areas of constitutional jurisprudence (such as equal protection), the choice of strict scrutiny has typically meant that the law under review will not survive. In the free exercise context, however, strict scrutiny has not functioned in this way; instead it has functioned as a balancing of religious claims against governmental interests. *See* Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 242–43 (Stephen E. Gottlieb ed., 1993).

[24] That certain governmental interests can legitimately infringe the free exercise of religion has been called the "implied exception [to the Free Exercise Clause's facially absolute language] based on necessity." Laycock & Thomas, *supra* note 5, at 226–27.

first appearing in majority opinions of the Court in the late 1930s and early 1940s.[25] It has become a fairly common method, variously formulated, of constitutional interpretation. One example is its use in interpreting the Free Speech Clause in light of governmental interests in imposing time, place, and manner restrictions.[26] Another example is found in the jurisprudence of interpretation of the dormant Commerce Clause, where courts frequently balance state interests in regulating some aspect of interstate commerce as against the national interests in free trade.[27] And, as we shall see below, balancing has become a prominent method of interpreting the Free Exercise Clause, balancing the individual's right to engage in religious exercises as against governmental interests in regulating or outlawing such exercises.[28]

A major theme of the *Smith* opinion, written by Justice Scalia, is that the balancing of competing interests is a function better left to the legislative bodies.[29] Judges, in other words, are less capable than popularly-elected

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[25] *See* Aleinikoff, *supra* note 22. Professor Aleinikoff further notes that, while the Court never explained why balancing was a proper form of constitutional interpretation, balancing

> was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism as well as to half a century of intellectual and social change. Building on the work of Holmes, James, Dewey, Pound, Cardozo, and the Legal Realists, and flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law.

Id. at 949.

[26] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (balancing important or substantial governmental interest as against any alleged restriction on free expression).

[27] *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (balancing a legitimate local public interest in a commercial regulation as against the regulation's effects or burdens on interstate commerce).

[28] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (balancing a free exercise claim as against an important governmental interest in regulating religious exercise); *see also infra* part IV.A.

[29] Employment Div. v. Smith, 494 U.S. 872, 882–90 (1990). Justice Scalia follows Justice Frankfurter in this restrained understanding of the role of the judiciary. "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties." Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940) (Frankfurter, J.), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justice Frankfurter thought that use of a higher standard of review in certain cases concerning liberties (including religion) erases the distinction between courts and legislatures. "If the function of this Court is to be essentially no different from that of a

legislators of determining the proper balance between individual rights and societal needs.[30] But that debatable proposition totally misconceives the nature of the judicial use of a balancing test. Courts develop and use balancing tests not to reflect majoritarian accommodations, but to define constitutional principles. In the judicial arena of constitutional interpretation, Professor Louis Henkin has observed that "balancing has become a term of . . . specific import, referring to explicit judicial weighing of competing values or interests to determine constitutional doctrine or its application."[31] Even Justice Scalia admitted this distinction when, in other contexts, he recognized that the Court makes "'balancing' judgments in determining how far the needs of the State can intrude upon the liberties of the individual . . . [because] that is of *the essence of the courts' function as the nonpolitical branch.*"[32] Indeed, legislative balancing may be subject to judicial balancing precisely to ensure that the lawmaking process and its product comport with the Constitution.

Thus, judicial balancing as "constitutional doctrine in the application of [the Free Exercise Clause] . . . [can be] justified as a matter of constitutional construction of [that Clause]."[33] Balancing is a product of judicial review of constitutional claims, one that "softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree. It provides an answer . . . to what the Constitution means when the words do not say what it means."[34]

One can only conclude that judicial balancing is not a replication of nor a substitute for legislative balancing of competing interests. Legislative balancing is either an expression of majoritarian resolution of competing political interests, interest group victory, or commitment to minority protection; but it differs from judicial balancing, which is done to resolve what the Constitution

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legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate." *Barnette*, 319 U.S. at 652 (Frankfurter, J., dissenting).

[30] *Cf.* Justice O'Connor's statement in her concurring opinion in *Smith* that "courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[31] Henkin, *supra* note 15, at 1024.

[32] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (emphasis added). Justice Scalia contrasts this appropriate balancing with what he considers to be inappropriate balancing in the interstate commerce area, where balancing is a "task squarely within the responsibility of Congress." *Id.*; *see also* Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (where Justice Scalia balanced Fourth Amendment privacy against school's interest in drug testing).

[33] Henkin, *supra* note 15, at 1047.

[34] *Id.*

means when the words do not say what it means. The legislative result of balancing is often imperfect, politically motivated, and harsh and insensitive to individual interests. In fact, Justice Scalia readily admits that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[35]

As Justice Jackson once eloquently wrote, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[36] The establishment of a judicial balancing test is but one way of withdrawing the Free Exercise Clause from the vicissitudes of political controversy.

IV. THE HISTORY OF BALANCING FREE EXERCISE RIGHTS

Since comprehensive development of a federal free exercise jurisprudence began in 1940, a recurring question has been whether the Free Exercise Clause prohibits only laws that target the exercise of religion for specific disability, or whether the Clause also prohibits laws that are generally applicable, facially neutral, and minimally rational but that nevertheless substantially burden religious exercise.[37] Two interpretive approaches yield different answers to this question. A categorical reading of the Clause yields a narrow protection against facially discriminatory laws,[38] while a balancing approach yields a broader protection to religion from burdens regardless of the form or purpose of the law.

The nineteenth (and some twentieth) century cases interpreting the Free Exercise Clause have employed a categorical approach. Categorization has been called "the taxonomist's style—a job of classification and labeling."[39] This interpretive technique draws the line between religious exercise that comes within the protective ambit of the Free Exercise Clause and that

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[35] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[36] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[37] Compare the opinion of Justice Frankfurter with the dissent of Justice Stone in Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); compare Braunfeld v. Brown, 366 U.S. 599 (1961) with Sherbert v. Verner, 374 U.S. 398 (1963); and compare the opinion of Justice Scalia in Employment Div. v. Smith, 494 U.S. 872 (1990) with the concurring opinion of Justice O'Connor in that case and with the opinion of Justice Souter in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993).

[38] For a discussion of facial and formal discrimination, see Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

[39] Sullivan, *supra* note 23, at 241. "When categorical formulas operate, all the important work in litigation is done at the outset." *Id.*

religious exercise which does not. It draws that line by determining what is properly within the state's function: religion is protected from illegitimate state action, but not from legitimate state action. Initially, then, the categorical approach focuses not so much on defining the scope of rights as on "interpreting the proper justifications for exercises of political authority."[40] For more than a century, for instance, beliefs and ecclesiastical decisions on theological matters have been absolutely protected from government regulation because there is no legitimate role for the state in these areas.[41] The state is forbidden from setting any religious orthodoxy; thus, there is no proper justification for government regulation of belief "as such."[42]

In addition to protecting religious belief, the categorical approach offers some protection to religious conduct. Here the focus continues to be on the legitimacy of the government regulation. When government purposely targets religious conduct alone for suppression or discrimination (by a law's form or purpose), the reasons for such conduct "are simply excluded from being acceptable bases for action."[43] Since there are likely no proper justifications for government regulation of this sort, religious conduct that suffers from such legal disability comes within the ambit of the Free Exercise Clause.[44] But when government enacts or enforces neutral, general laws, by appropriate authority and process, these can be easily justified. Inadvertent burdens to religious conduct caused by such neutral, general laws do not come within the protection of the Clause.[45] Thus, one product of the categorical approach is a per se rule that general,

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[40] Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 713 (1994).

[41] In Reynolds v. United States, 98 U.S. 145 (1879), the Court drew the distinction between religious beliefs and acts, thereby creating one category of beliefs protected absolutely (within the ambit of the Clause) and another category of actions subject to otherwise valid law (outside the Clause). Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871), a federal common law decision later constitutionalized in Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952), held that religious decisions of the highest decisionmaking authority of a church were protected absolutely from government intrusion.

[42] Sherbert v. Verner, 374 U.S. 398, 402 (1963). *See generally* Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993).

[43] Pildes, *supra* note 40, at 714.

[44] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

[45] The categorical approach thus subjects these laws to the lowest standard of review, rational basis, despite their potential to burden religion.

neutral laws are outside the Clause's reach.[46]

In 1963, after a period of interpretive transition,[47] the Supreme Court embraced the balancing approach.[48] Unlike the categorical approach, this methodology focuses on defining the *scope* of the free exercise right and so emphasizes not the form or purpose of the law but its effects on religious exercise. And contrary to the per se rule that general and neutral laws are presumed legitimate, the balancing approach recognizes that "on some occasions official power must justify itself in a way that otherwise it need not."[49] If religious exercise suffers an infringement, then the Court subjects the law to the "most exacting" level of review, which requires the government to demonstrate a compelling interest served by the legislation with no less restrictive alternative available. If the test is not met, the Court strikes the law with respect to the religious claimant, thereby carving out a religious exemption. The Court has explained that it acts "not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . , withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[50] Thus, through balancing, religiously neutral laws are brought within the ambit of the Clause.

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[46] Employment Div. v. Smith, 494 U.S. 872 (1990).

[47] The seeds of the transition to balancing as the constitutional doctrine of the Free Exercise Clause were planted by collateral developments in the Free Speech and Commerce Clause areas in general, and by these cases in particular: Prince v. Massachusetts, 321 U.S. 158 (1944); Jones v. Opelika, 316 U.S. 584, 601 (1942) (Stone, J., dissenting), *rev'd*, 319 U.S. 103 (1943); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J., dissenting); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[48] Sherbert v. Verner, 374 U.S. 398 (1963). These two approaches—categorical and balancing—"employ different rhetoric . . . [and t]he terms of rhetoric matter. They make different arguments possible. They bring different factors into the foreground. You simply cannot do everything with boxes [i.e., categories] that you can do with balancing." Sullivan, *supra* note 23, at 253–54.

Despite this primary shift to balancing, many cases have continued to retain the marks of the categorical approach. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (no compelled affirmation of repugnant beliefs). As is the case for many areas of jurisprudence, "categorization and balancing need not be regarded as competing general theories of the First Amendment, but are more helpfully employed in tandem, each with its own legitimate and indispensible role in protecting expression." John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

[49] O'Lone v. Estate of Shabazz, 482 U.S. 342, 356–57 (1987) (Brennan, J., dissenting).

[50] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

A. *Balancing as Free Exercise Doctrine*

Professor Henkin notes that "several clauses of the Constitution are read as declaring conditional prohibitions that depend on balancing."[51] With signals of movement toward this understanding of the Free Exercise Clause as early as 1940, the Court unequivocally adopted such a reading in the 1963 case of *Sherbert v. Verner*.[52] A Seventh-Day Adventist, fired from her job because she would not work on her sabbath, was denied unemployment compensation. The Court held that the denial operated like a tax on her religious practice, burdening her religion without sufficient justification. Justice Brennan wrote for the Court: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[53] The state's concern that fraudulent claims would be encouraged by creating a religious exemption was held not compelling. Had it been, the state would still be required to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[54]

Here, balancing is not only interpretive technique; in this context, it is the constitutional doctrine of the Free Exercise Clause. The substantive principle developed in *Sherbert* is that the constitutionality of government action depends entirely on the weighing process.[55] On one side of the scale is the question

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[51] Henkin, *supra* note 15, at 1037.

[52] 374 U.S. 398 (1963).

[53] *Id.* at 406–07 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[54] *Id.* at 407.

[55] With *Sherbert*, balancing became the normative practice of determining constitutional doctrine. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); McDaniel v. Paty, 435 U.S. 618 (1978) (plurality); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971).

Balancing would have been the constitutional doctrine in these cases had a substantial burden been found: Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Braunfeld v. Brown, 366 U.S. 599 (1961).

Even precedent that had relied on the categorical approach was reinterpreted within the balancing rubric: *Sherbert* read Reynolds v. United States, 98 U.S. 145 (1878) and Braunfeld v. Brown, 366 U.S. 599 (1961), as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403.

whether there exists a burden on the free exercise of religious conduct; on the other, whether that burden is justified ("outweighed" or "overbalanced") by a compelling state interest, and whether the government's conduct is the least restrictive means of implementing such an interest. To engage in the judicial balance and decide whether or not the burden is justified is the act of "specifying" the principle; each balance shapes the free exercise norm and "render[s] it determinate in a context to which it is relevant but in which it is (until specified) indeterminate."[56] In its grossest formulation, the doctrine of the Free Exercise Clause after *Sherbert* is this: The government may burden religion when the governmental or public necessity exceeds the burden; the government shall not burden religion when the burden outweighs the governmental or public interest.

The substantive principle that religious claims and government interests must be balanced can be applied by "ad hoc balancing" or by "definitional balancing" (which applies the result of a balance to a class of cases).[57] *Sherbert*'s balance was done in an ad hoc fashion; that is, it did not produce a rule for general application in other cases.[58] Ad hoc balancing also characterized *Wisconsin v. Yoder*,[59] the decision often referred to as the high water mark of free exercise. Amish parents were granted an exemption from the last two years of the compulsory education requirement for their teenage children. The Court found that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests."[60]

Ad hoc balancing calls for a highly fact-specific examination of both the religious and governmental sides of the balance. In *Yoder*, the Amish lifestyle and beliefs were assessed with great particularity; the government's interest was assessed in particular relationship to the Amish, with the Court finding that the state's "interest in compelling school attendance of Amish children to age

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[56] Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 108 (1993).

[57] *See generally* Henkin, *supra* note 15; Aleinikoff, *supra* note 22.

[58] It was later interpreted to have done so, but by its own terms it did not produce a rule for application in all cases of unemployment compensation. *See infra* text accompanying note 75.

[59] 406 U.S. 205 (1972).

[60] *Id.* at 214. The Court emphasized its role in "balancing" the liberty and state concerns: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215. The state was unable to show how "its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.* at 236. This differs from the formulation in *Sherbert*, which emphasized the least restrictive means of achieving some compelling state interest.

16 emerges as somewhat less substantial than requiring such attendance for children generally."[61]

Thomas v. Review Board[62] involved a Jehovah's Witness who refused to work in weapons manufacture, quit his job, and was subsequently denied unemployment compensation. There the Court undertook a balance, in which it determined that the "interests advanced by the state [such as concern over widespread termination of employment for religious reasons] do not justify the burden placed on free exercise of religion."[63] This, too, was a careful analysis of each element of the balance, focusing on the particularities of the case.

Ad hoc balancing has been the subject of severe criticism over the years. Appearing to call for unguided judicial discretion, ad hoc balancing smacks of indeterminacy and subjectivity.[64] As Professor Nimmer has pointed out, "ad hoc balancing means that there is no rule to be applied, but only interests to be weighed."[65] There is no standard by which one can measure whether a given interest will be held of greater or lesser weight.[66] Commentators worry that, under such circumstances, the liberty claim will be vulnerable to the more statist leanings of courts.[67]

But this has not been the case under the Free Exercise Clause. In fact, the most vigorous protection for free exercise has come in the ad hoc application of the balance, as we see in *Sherbert*, *Yoder*, and *Thomas*. This is so because an ad hoc balance gives a close look at the individual religious claimant and the particular state interest as it burdens that claimant, and requires the government to demonstrate either the absence of alternatives or the devastating effects the particular exemption requested would have on its interest. The ad hoc, case-

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[61] *Id.* at 228-29.

[62] 450 U.S. 707 (1981). Had *Sherbert* been a definitional balance, the Court in *Thomas* would not have engaged in a balance; the Court simply would have applied the rule in *Sherbert*. *Thomas* itself is an ad hoc balance because the Court engages in a balance, uses *Sherbert* as precedent, and does not articulate a rule to be applied in future cases.

[63] *Id.* at 719.

[64] Henkin, *supra* note 15, at 1048 (Balancing "is essentially unrelated to text . . . . As substantive doctrine, it further attenuates the links between judicial review and the text of the Constitution . . . . Together with related phenomena—tiers of scrutiny . . .—it gives a view of judicial review that is intuitional . . . ."); *see also* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 691 (1994).

[65] Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939 (1968).

[66] *Id.*

[67] [I]n the overwhelming majority of the major free speech cases in which the ad hoc balancing approach has been applied, the weighing of interests has come out on the side which opposes freedom of speech." *Id.* at 940.

specific and fact-intensive analysis benefits the religious claimant.[68] For instance, once a burden is shown, it is very difficult for the government to show that the *particular* law or policy being challenged embodies a compelling governmental interest. Even if its law does reflect a paramount interest, it is very difficult for the government to show that it had no other way of achieving its goal, or to prove that carving out an exemption from that law for this person or group, or similarly situated persons or groups, would irreparably disrupt its ability to carry out its compelling goal vis-à-vis those not exempted. It is particularly difficult for the government to make this showing where the burden is on a minority religious group and the effects of any exemption are limited.

B. *The Development of Definitional Balancing*

Given the criticisms of ad hoc balancing as a general constitutional interpretive technique, commentators have noted that it "has to be circumscribed and domesticated."[69] In the free exercise context, that process of "domestication" began with the growth of definitional balancing, balancing that generates a rule applicable in other cases.[70] The balance done in one case determines that some *classes* of religious claims are presumptively outweighed by the state's interest (or vice versa). While commentators have called for definitional balancing as the more principled balancing technique, the Court's increasing reliance on it has produced little protection for religious claimants.

Definitional balancing acts like a compromise between the categorical approach and ad hoc balancing.[71] The particularity of both the religious claim

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[68] *See* William B. Ball, *Accountability: A View from the Trial Courtroom*, 60 GEO. WASH. L. REV. 809, 812 (1992) (*Sherbert* and *Yoder* are "fact intensive," rendering the evidentiary record very important); *accord* Berg, *supra* note 5, at 20 ("institut[e] a case-by-case 'close scrutiny' of government actions that harm religion . . . without setting up a virtual per se rule against such effects").

[69] Henkin, *supra* note 15, at 1049.

[70] *See* Alenikoff, *supra* note 22, at 948 ("balancing that establishes a substantive constitutional principle of general application"). Rough equivalents to ad hoc and definitional balancing have been referred to as balancing "at the margin" (scrutiny of the government's interest in preventing the specific exemption being requested) and balancing "in gross" (scrutiny of the government's interest in preventing the undermining of the law in society). *See generally* Berg, *supra* note 5, at 194; Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995).

[71] *See generally* Faigman, *supra* note 64; Nimmer, *supra* note 65. *But cf.* Aleinikoff, *supra* note 22, at 979–81:

> "definitional" balances are often undermined by new interests or different weights for previously considered interests. [This leads to a] fragility of a definitional balance and

and the government's interest—the focus of ad hoc balancing—is gone. Instead, the Court evaluates the claimed liberty against social interests at a high level of generality (and consequent abstractness) in order to produce a rule directly applicable in future cases without the need to balance.[72] Definitional balancing thus yields classes of protected [73] and unprotected[74] activity.

Some of the earlier decisions that typified ad hoc balancing began to be reinterpreted as definitional balancing. *Sherbert* and *Thomas*, each earlier produced by ad hoc balancing, came to be understood to govern the area of unemployment compensation. The general principle that they were now understood to yield was that the state cannot "condition receipt of [unemployment] benefits upon conduct proscribed by religion or deny benefits because of conduct mandated by religion."[75]

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the artificiality of the distinction between "definitional" and "ad hoc" balancing. New situations present new interests and different weights for old interests. If these are allowed to reopen the balancing process, then every case becomes one of an "ad hoc" balance, establishing a rule for that case only. Balances are "definitional" only if the Court wants to stop thinking about the question.

[72] David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 779 (1994), writes that the level of generality may not be consistently measured:

> Balancing should require congruence between the levels of generality on each side of the scale. In contrast to ad hoc balancing, we would expect that both the government's interests and individual liberty would be calculated generally in definitional balancing. . . . In practice, however, courts regularly violate this symmetry by balancing a generalized or abstract factor on one side of the equation while the other side is described in concrete, case-specific terms.

Id.

This led, over time, to a narrowing of what constituted a burden on religion and an expansion of what constituted a compelling interest. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1414 (1992); *see also* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992). Because of this weakening, definitional balancing is often mistaken for an abandonment of strict scrutiny and adoption of intermediate scrutiny.

[73] McDaniel v. Paty, 435 U.S. 618 (1978).

[74] Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Gillette v. United States, 401 U.S. 437 (1970).

[75] Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987). This "rule" was applied in *Hobbie* and Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989). This is not simply the application of precedent. Because *Hobbie* and *Frazee* were sufficiently distinct from *Sherbert* and *Thomas*, the Court could have engaged

The Court's definitional balancing in *United States v. Lee*[76] did not produce a general rule quite so hospitable to religious claimants. Amish employers sought an exemption from having to pay into the social security taxation system, because they did not use the system; care for community elders was a part of their religious life. Had the Court engaged in an ad hoc balance, it would have been hard to deny the claim, as it was structurally similar to *Yoder*: there was a clear burden on free exercise, a showing of a compelling interest of the state in maintaining a social security system for the elderly, but no showing that the social security system would in any way be endangered by providing this exemption for these Amish employers. In fact, an exemption already existed for self-employed Amish, and this lawsuit simply sought to rationalize the government's treatment of all-Amish businesses.

But the Court chose a definitional balance that announced a rule far beyond the Amish community. While a burden on their religion was established, so was an "overriding governmental interest" in preservation *not* of the social security system but of a *uniform federal taxation scheme* free of judicial exemptions. The government's interest was defined at a very high level of abstraction, the hallmark of definitional balancing. For the Court to carve out an exemption would mean that the floodgates would open: the entire structure of federal taxation would be vulnerable to any religious objections to payment of any tax.

As a definitional balance, *Lee*'s result could then be applied in other cases without having to engage in the balance. The case actually gave rise to two lines of cases in which all the religious claimants failed: one held general, religion-neutral tax laws constitutional;[77] the other held internal government decisionmaking constitutional.[78]

Much criticism of the Court's application of the strict scrutiny standard of review has centered on the fact that so many religious claimants lose. In fact, this "win-loss record" was a major justification for *Smith*'s rejection of balancing: Justice Scalia did not think the compelling interest test controlled in more than a handful of cases—and those were all ad hoc balances. Yet it seems more likely that the Court's record on free exercise resulted not from a failure to use strict scrutiny, but from implementing strict scrutiny with an overemphasis on definitional balancing. Justice O'Connor has held firm to the

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in ad hoc balancing in each case.

[76] 455 U.S. 252 (1982).

[77] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990); Hernandez v. Commissioner, 490 U.S. 680 (1989).

[78] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986).

belief that strict scrutiny has indeed been applied consistently,[79] and that the success of the government in many cases simply shows the judiciary's ability "to strike sensible balances between religious liberty and competing state interests."[80]

C. *Inching Back to the Categorical Approach*

A return to a categorical methodology was suggested as early as 1982.[81] The movement (not isolated to this Clause)[82] was felt by the late 1980s, when the Court began to return to making substantive distinctions between laws within and outside the scope of the Free Exercise Clause based upon whether

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[79] Justice O'Connor noted:

> One can . . . glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."

Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting).

[80] Employment Div. v. Smith, 494 U.S. 872, 902 (O'Connor, J., concurring); *see also* Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring in part and concurring in the judgment).

[81] Justice Stevens, concurring in United States v. Lee, 455 U.S. 252 (1982), called for the presumptive constitutionality of otherwise valid tax laws that are entirely neutral in general application, regardless of any burden on religious exercise. *Id.* at 263. Similarly, in 1986, Chief Justice Burger wrote, in a plurality opinion joined by Justices Powell and Rehnquist in Bowen v. Roy, 476 U.S. 693 (1986), that

> [t]he test applied in cases like Wisconsin v. Yoder is not appropriate in this setting. In the enforcement of a *facially neutral and uniformly applicable* requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. [Instead], the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, *neutral and uniform in its application*, is a reasonable means of promoting a legitimate public interest.

Id. at 707–08 (emphasis added).

[82] Professor Kathleen Sullivan notes that the movement from a balancing approach to a categorical approach is a more general trend in the Court's constitutional jurisprudence, naming Justice Scalia a leader of this movement. Sullivan, *supra* note 23, at 241.

there existed proper justifications for government regulation of religious conduct. For religious claims arising in the military and prison contexts, the Court adopted a far more deferential standard toward the professional judgments of military[83] and prison officials.[84] Because neutral, general regulations are legitimately within the authority of these officials, inadvertant burdens on religious exercise resulting from such regulations are not constitutionally cognizable. Thus, the Court eschewed a balancing approach and returned to a categorical methodology for these populations.

It must be noted that the Court's determination that it is "ill-equipped" and "ill-suited" to disturb what other units of government have done, though often called an "institutional" decision,[85] is nonetheless a substantive determination of the meaning of the Constitution.[86] The Court does not abstain from adjudicating, as it does in situations of political questions.[87] Deference to the "institutional competence" of military and prison officials translates directly into the substantive meaning of the Free Exercise Clause: The vast majority of religion claims in the military and prison settings are categorically excluded from its protective reach.[88]

Thus, on the eve of the *Smith* decision, while the military and prison cases had been set aside for different treatment, all other cases continued to be

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[83] Goldman v. Weinberger, 475 U.S. 503 (1986). The judiciary must give

> great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have". . . but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy.

Id. at 507–08.

[84] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Prison regulations are constitutional so long as they are "reasonably related to legitimate penological interests." *Id.* at 349. Measuring the constitutionality of prison administration policies in this way "reflects the respect and deference that the United States Constitution allows for the judgment of prison administrators" and "avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'" *Id.* at 349–50.

[85] *See generally* Joanne C. Brandt, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995).

[86] *See* Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 492–99 (1990) (asking why the Court's refusal to balance—for reasons of institutional incapacity—should mean that "the court has passed on the ultimate constitutionality of the conduct of the government actor").

[87] *See infra* part V.B.

[88] The fact that some minimal review remains does not vitiate this labeling. Some form of rational basis review is always involved when the court takes jurisdiction.

governed by the balancing approach, whereby any law—including a religiously neutral law—that substantially burdens religious conduct requires a balancing between the governmental interest at stake and the burden thereby imposed on that conduct. The categorical approach, as traditionally understood as the methodology which excludes religiously neutral laws from the reach of the Clause, had made but a slight appearance on the horizon.

V. THE NATURE OF THE *SMITH* DECISION

Smith rejected the balancing approach for generally applicable, facially neutral laws and with it the doctrinal formulation that the meaning of the Free Exercise Clause is dependent upon a judicial weighing of religious claims and governmental interests. Justice Scalia's opinion illustrates some of the major interpretive problems and options that adhere to any judicial reading of the Clause. What kind of a "law" respecting the free exercise of religion is rendered unconstitutional by this Clause? Does the word "law" refer to any statute or regulation, however neutral or generally applicable it may be, that substantially burdens one's exercise of religious beliefs? Or does the Clause refer only to those non-neutral laws that specifically target religious exercises? And what kind of laws that burden religious exercises should be subjected to strict scrutiny by way of balancing governmental interests and the resulting religious burden?

The very first sentence in Justice Scalia's opinion defines the interpretive issue as:

> whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use [by Native Americans] within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.[89]

The answer, says the *Smith* opinion, is that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law

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[89] Employment Div. v. Smith, 494 U.S. 872, 874 (1990). See also Justice O'Connor's separate opinion in *Smith*, stating that the constitutional question upon which the Court granted certiorari in *Smith* was "whether the Free Exercise Clause protects a person's religiously motivated use of peyote from the reach of a State's general criminal law prohibition." *Id.* at 891. But compare Justice Souter's concurring remarks in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2247 (1993), to the effect that neither party in *Smith* squarely addressed the proposition that the Court there embraced, i.e., "that the Free Exercise Clause was irrelevant to the dispute" arising out of a neutral and generally applicable law.

of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes).'"[90] As interpreted by *Smith*, the Free Exercise Clause affords no constitutional haven for those whose religious activities would violate a neutral law of general applicability. That interpretation means that the Clause has been diminished, that its protection extends only to those religious exercises that are targeted by a non-neutral law that may lack any compelling governmental interest.

In thus reading and interpreting the sparse text of the Free Exercise Clause, the *Smith* Court had to choose between the two interpretive methodologies embedded in the Clause's history: categorical and balancing. For generally applicable, facially neutral laws, *Smith* follows the first approach, and rejects the second.

A. *The Categorical Approach*

The *Smith* Court chooses to read the words "prohibiting the free exercise [of religion]" as saying that "if prohibiting [or burdening] the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[91]

In other words, *Smith* reads the words of the Clause to exclude from its scope the category of laws that are religiously neutral and generally applicable in nature.[92] This reading limits the reach of the Clause to what Justice O'Connor's separate opinion calls "the extreme and hypothetical situation in which a State directly targets a religious practice . . . [and thereby] relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."[93]

This categorical exclusion of neutral laws is said to be "a permissible reading of the text" of the Free Exercise Clause, a reading that Justice Scalia

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[90] *Smith*, 494 U.S. at 879. The internal quotation in the above *Smith* quotation is from the concurring opinion of Justice Stevens in United States v. Lee, 455 U.S. 252, 263 n.3 (1982). Justice Stevens, the first to articulate a return to a categorical methodology in *Lee*, joined the majority opinion in *Smith*. *See supra* note 81 and accompanying text.

[91] *Smith*, 494 U.S. at 878.

[92] *See also* Barnes v. Glen Theatre, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (public indecency regulation that is general and is "not specifically directed at expression . . . is not subject to First Amendment scrutiny at all."); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (a general law is not subject to strict scrutiny simply because it is enforced against the press).

[93] *Smith*, 494 U.S. at 894 (internal quotation marks omitted).

believes from the "vast majority" of past decisions to be the "correct one."[94] Naming early categorical articulations of the Clause (one of them overruled nearly fifty years before) as controlling precedent,[95] Justice Scalia crafted the Clause's narrow reading. As later explained in Justice Scalia's concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah*:

> The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in [*Smith*] and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment.[96]

The *Smith* opinion adds that the second or broader reading of the Clause, one that would include neutral and generally applicable laws within its proscription, would produce a "constitutional anomaly" in the form of "a private right to ignore generally applicable laws."[97] Under such a broader reading, says the *Smith* Court, "every [generally applicable] regulation of conduct that does not protect an interest of the highest order . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[98] That prospect, in the Court's

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[94] *Id.* at 878. In the *Smith* case, Justices O'Connor, Brennan, Marshall, and Blackmun vigorously disagreed with the "correctness" of Justice Scalia's textual reading of the Free Exercise Clause, as well as with his assertion that Court precedents supported that reading. In their view, the Clause encompasses all laws that substantially burden religious exercises, including those laws that are facially neutral and generally applicable, and that most if not all the Court precedents had consistently so read the Clause. *Id.* at 891, 907. In Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2248 (1993), Justice Souter in concurrence noted that "Smith did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was 'a permissible reading' of the Clause."

[95] Minersville Sch. Dist. v. Gobitis, 310 U.S. 296 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Reynolds v. United States, 98 U.S. 145 (1879).

[96] *Hialeah*, 113 S. Ct. at 2239.

[97] *Smith*, 494 U.S. at 886. Justice Scalia finds some solace for this proposition in United States v. Reynolds, 98 U.S. 145 (1879). There the Court rejected a free exercise claim that federal criminal laws against polygamy could not constitutionally be applied to religious practitioners of polygamy. "To permit this," said the Court, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds*, 98 U.S. at 167.

[98] *Smith*, 494 U.S. at 888. Justice Scalia misses the distinction between ad hoc and definitional balancing. The Court then proceeds to outline a "parade of horribles," generally applicable and neutral laws that would be subject to judicially created religious exemptions.

view, is sufficient reason for reading the Free Exercise Clause narrowly, confining its reach to laws that are non-neutral, or not generally applicable, and that are targeted directly at religious exercises.[99]

The *Smith* Court's rejection of balancing and the consequent exclusion of neutral, generally applicable laws is not, nor can it be, as comprehensive a claim as Justice Scalia asserts. *Smith* does not explicitly overrule fifty years of precedent. Numerous cases involving generally applicable, facially neutral laws have read the Clause to mean that such laws are subject to heightened judicial scrutiny. The solution in *Smith* is to reinterpret these cases. Where the religious claimant lost, the *Smith* Court questions whether strict scrutiny was actually applied. Where the religious claimant prevailed, the *Smith* Court creates a new category of "hybrid" rights. Justice Scalia explains,

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause *in conjunction with other constitutional protections*, such as freedom of speech and of the press.[100]

What this "hybrid" right looks like in the post-*Smith* world has not been determined.[101] Presumably, however, a neutral, generally applicable law that implicates the Free Exercise Clause as one of several constitutional claims

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The Court includes in its parade compulsory military service laws, tax laws, health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, traffic laws, social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. *Id.* at 889. In the Court's words, "[t]he First Amendment's protection of religious liberty does not require this." *Id.*

[99] As stated in *Hialeah*, if a law fails to satisfy the *Smith* requirements of neutrality and general applicability, the law "must be satisfied by a compelling governmental interest and must be narrowly tailored to advance that interest." *Hialeah*, 113 S. Ct. at 2226. In other words, such non-neutral or targeted laws are within the ambit of the Free Exercise Clause and its proscription.

[100] *Smith*, 494 U.S. at 881 (emphasis added). Cantwell v. Connecticut, 310 U.S. 296. (1940) (strict scrutiny applied to burdens on proselytizing) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (strict scrutiny applied to burdens on parents' decisions concerning religious upbringing of children) are explained under this rubric. The line of unemployment cases, beginning with Sherbert v. Verner, 374 U.S. 398 (1963), continues to enjoy strict scrutiny under another theory: "[I]ndividualized assessments" made by the government need close judicial examination because of the capacity for discrimination against religion.

[101] *See, e.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (zoning prohibition on church in city downtown may implicate "hybrid" rights). But the "hybrid" concept has been left largely undeveloped by lower federal courts.

continues to enjoy protection under a balancing approach. But this balancing is *not* part of the doctrine of the Free Exercise Clause; it is doctrine for the new hybridized grouping of constitutional provisions, of which free exercise is only a part and the contours of which we cannot yet see.[102] The doctrine now is that only religiously-targeted and non-neutral laws come within the ambit of the Free Exercise Clause.[103]

In terms of understanding the RFRA reaction to the *Smith* decision, the significance of the case is to be found somewhere other than in the correctness or wrongness of its narrow reading or interpretation of the Free Exercise Clause, or in the convincing or unconvincing nature of its rationale, or in its consistency or inconsistency with prior case law.[104] What is important is the fact that the *Smith* Court, for better or worse, has performed a legitimate and exclusive judicial function of reading and interpreting a Clause of the Constitution in the context of an Article III case or controversy. It has assumed once again "the ultimate responsibility of this Court to act as the ultimate interpreter of the Constitution."[105]

In accepting that responsibility with respect to interpreting the Free Exercise Clause, the Court has employed a controversial but permissible methodology of reading and interpreting the text of the Clause itself, no attention being paid to the so-called intent of the framers of that provision.[106] That process has resulted in what Justice O'Connor has described as a "single categorical rule" stemming from "a strained reading of the First

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[102] *See* Faigman, *supra* note 72, at 772–73.

[103] Laws that are targeted at religious practice must "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Hialeah*, 113 S. Ct. at 2226. These laws "must undergo the most rigorous scrutiny" and "will survive strict scrutiny only in rare cases." *Id.* at 2233. This is not a per se rule in which such a law is automatically held unconstitutional. However, *Hialeah*'s form of strict scrutiny appears to be less like the balancing developed in the free exercise area and more like the strict version developed in other areas of constitutional jurisprudence. *See supra* note 23.

[104] For a devastating critique of *Smith*'s reading of the text of the Free Exercise Clause, as well as *Smith*'s mistreatment of free exercise history and judicial precedents, see McConnell, *supra* note 3; Laycock, *supra* note 6.

Such criticism of *Smith* is well-founded. As compared to ad hoc balancing, a categorical approach that excludes neutral, generally applicable laws from the Free Exercise Clause provides little protection for religious conduct. In the post-*Smith* period, several states that wanted to afford greater protection to religious exercise chose to interpret their own constitutions to require balancing as state constitutional doctrine. *See, e.g.*, Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275.

[105] Powell v. McCormack, 395 U.S. 486, 549 (1969).

[106] McConnell, *supra* note 14.

Amendment,"[107] or in what Justice Souter has called the "*Smith* rule"[108] which excludes from consideration incidental burdens on religious exercise caused by neutral, generally applicable laws.

B. *The Balancing Approach*

The Court having thus constructed a categorical absolute from its "permissible" and "preferred" reading of the Free Exercise Clause, it is understandable that it rejects balancing as constitutional doctrine for neutral, generally applicable laws. An absolute is an absolute. A law that is deemed totally and absolutely outside the textual realm of a constitutional proscription need not be subjected to strict scrutiny in order to justify its exclusion from that proscription.[109]

The inappropriateness of balancing is a natural consequence of the *Smith* Court's narrow reading of the textual scope of the Free Exercise Clause. It is, of course, possible to read the words "no law . . . prohibiting the free exercise [of religion]" more broadly to include "a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[110] These words were read this way for decades. In fact, Justice Souter noted in *Hialeah* that "a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced."[111] But "[a]s a textual matter," concluded the *Smith* Court, "we do not think the words must be given that meaning."[112] And

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[107] Employment Div. v. Smith, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring in judgment).

[108] Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240 (Souter, J., concurring in part and concurring in the judgment).

[109] Such a law is presumptively valid. A determination of its invalidity depends upon some constitutional provision other than the Free Exercise Clause or on the "hybrid" concept, which aggregates the Free Exercise Clause with other enumerated and unenumerated rights.

[110] *Smith*, 494 U.S. at 878.

[111] *Hialeah*, 113 S. Ct. at 2248.

[112] *Smith*, 494 U.S. at 878. Having chosen to read the Free Exercise Clause categorically, in the form of an absolute exclusion of religiously neutral laws, the *Smith* opinion then adds additional reasons for rejecting any reading of the Clause that "a religious exemption [from a neutral and generally applicable law] must be evaluated under the balancing test set forth in *Sherbert v. Verner*." *Id.* at 882–83. Following an analysis of prior Court precedents, an analysis that draws heavy fire from the dissenting Justices, *Smith* concludes "that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [balancing] test inapplicable to such [free exercise] challenges [to neutral and generally applicable laws]." *Id.* at 885.

here again, however one may disagree with *Smith*'s textual reading of these imprecise words, the Court is merely performing its unique and exclusive function of being the supreme interpreter of the majestic generality of the Free Exercise Clause in the context of an Article III case or controversy. As that interpreter, the Court legitimately may read the Clause narrowly or broadly, to find or create categorical distinctions in the words, or to pour content into the generalities by resort to history, tradition, original intent, precedent, practicalities, or balancing of competing interests. All of this is but a reflection of the fact that a word, especially a word in the Constitution, "is not [a] crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[113]

The *Smith* Court suggests that, if religious exemptions from generally applicable laws are to be made, it is far better that they be made by the political bodies. Courts are said to be institutionally ill-equipped to engage in a balancing battle among competing religious, social, and economic forces, to "weigh the social importance of all [uniform and generally applicable] laws against the centrality of all religious beliefs."[114] Though this confuses the difference between legislative and judicial balancing,[115] *Smith* does not represent an abdication of constitutional interpretation. The determination not to subject the neutral, generally applicable decisions of political branches or "expert" bodies to strict scrutiny review is itself the articulation of a substantive constitutional norm: The law, if otherwise valid, is constitutional.[116]

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[113] Towne v. Eisner, 245 U.S. 418, 425 (1918).

[114] *Smith*, 494 U.S. at 890. The *Smith* Court concedes, as it must, that a balancing or compelling governmental interest test is frequently used in other contexts, such as restraints on the content of speech or differing treatments based on race. *Id.* at 885–86. But use of the test in such other contexts is said not to "produce a private [and anomalous] right to ignore generally applicable laws [as in *Smith*]," but rather to produce constitutional norms such as "equality of treatment and an unrestricted flow of contending speech." *Id.* at 886.

[115] *See supra* notes 22–36 and accompanying text.

[116] *See supra* note 86. One commentator remarks that *Smith* is "a decision about institutional arrangements more than about substantive merits" and suggests that *Smith* is a "political question case, holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking." Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993) [hereinafter Lupu, *Statutes Revolving*]; *see also* Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 759–62 (1992) [hereinafter Lupu, *Trouble with Accomodation*]. The labeling of *Smith* as an "institutional" decision is inaccurate. While its rationale may invoke notions of judicial limitations, *Smith* nonetheless defines and constitutes substantive free exercise doctrine. Conkle, *supra* note 15, at 63–65.

Smith having made clear its choice of reading a categorical absolute into the Free Exercise Clause, all the discussion and debate in *Smith* over the merits of a balancing test do not detract from the Court's bottom line: The balancing approach, as we have known it, is no longer "constitutionally required."[117]

VI. THE RFRA RESPONSE TO THE *SMITH* DECISION

Immediate public reaction to *Smith* did not focus on its fact-specific holding: that Native American sacramental use of peyote could be criminalized via a general prohibition. It focused instead on the Court's dramatic and unanticipated rejection of balancing as the interpretive approach to the Free Exercise Clause. Members of Congress soon joined the chorus of academic, legal, and religious critics of *Smith*, calling it an infamous, disastrous, unfortunate, mischievous, dastardly, and ill-advised opinion that should and must be "overruled."[118] The tone of the congressional assault reflected the

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Smith determined that "free exercise" means the right to be free from laws that directly target, single out, or suppress religion without a compelling interest, which "also determine[d] both the nature and scope of the right of religious freedom." Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 868 (1994). "As a practical matter, deference to legislative and administrative judgment . . . was as much an indication that the interests at stake were presumptively compelling as it was the basis for forgoing the compelling interest standard altogether." Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 276 (1994).

Commentators on RFRA mistakenly rely on the "distinction" between institutional and substantive decisions about the Free Exercise Clause in their discussions of RFRA's constitutionality. *See infra* parts VI and VII. The argument runs as follows: If *Smith* is a substantive decision, RFRA is trying to contradict the Court's interpretation of the Free Exercise Clause, which it cannot do; but if *Smith* is an institutional decision, RFRA is not contradicting constitutional doctrine and is therefore constitutional. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 252–53; Lupu, *Statutes Revolving*, *supra*, at 60 (If *Smith* is a substantive interpretation, RFRA would suggest "that Congress can simply override the Court on matters of substantive constitutional law."). This distinction is unhelpful, because the "institutional" determination gives rise to a substantive interpretation of the Free Exercise Clause.

[117] *Smith*, 494 U.S. at 890.

[118] During the final Senate consideration of RFRA, *Smith* was simply referred to as "wrong" and "wrongly decided." See, e.g., Senator Hatch's statements: "The Smith case is wrong. It ought to be overruled," 139 CONG. REC. S14465 (daily ed. Oct. 27, 1993), and that "[t]he Smith case was wrongly decided and the only way to change it is with this legislation." *Id.* at S14353 (daily ed. Oct. 26, 1993).

The final House debates exhibited more drastic condemnation of *Smith*. See, e.g., Representative Nadler's remark that "[t]his legislation will overturn the Supreme Court's

intensity of Justice O'Connor's complaint that the *Smith* holding "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[119] Congress focused on legislating to reverse the decision by restoring generally applicable and facially neutral laws to the presumptive graces of the Free Exercise Clause.

Typically, legislatures react to an unfavorable free exercise decision by addressing its merits. After *Lyng v. Northwest Indian Cemetery Protective Ass'n*, where the Court found that a government road through sacred lands caused no constitutional burden on Native Americans even though their religious traditions were put at risk of extinction, Congress denied the appropriation for the road.[120] More typically, the response is in the form of a substantive accommodation of the religious exercise at issue, often as a statutory exemption.[121] After the Court failed to protect a Jewish military officer in his practice of wearing a yarmulke in *Goldman v. Weinberger*, Congress quickly reversed the decision by modifying military regulations so as to permit unobtrusive headgear.[122] Such a substantive response was ultimately

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disastrous decision [in *Smith*], which virtually eliminated the first amendment's protection of the free exercise of religion." 139 CONG. REC. H2359 (daily ed. May 11, 1993). Representative Schumer referred to "the infamous case known as the Smith case [which] rubbed against totally the American grain of allowing maximum religious freedom." *Id.* at H2360. Representative Edwards likewise described *Smith* as "an unfortunate decision . . . that put religious freedom in jeopardy in our country." *Id.* at H2357.

For discussion of the legislative hearings and debates leading up to RFRA's passage, see generally Berg, *supra* note 5; Whitbeck, *supra* note 5.

[119] *Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment).

[120] *See* Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 623 n.217 (1994) (discussing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and subsequent congressional action).

[121] There are perhaps as many as two thousand statutory accommodations of religion throughout the state and federal laws. Ryan, *supra* note 72, at 1445. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990) (finding constitutional the federal Equal Access Act, which permits religious speech during noncurricular club activities on the same basis as nonreligious speech); Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (finding constitutional § 702 of Title VII, which exempts religious organizations from the prohibition against discriminating in employment on the basis of religion); Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (interpreting Title VII of the Civil Rights Act of 1964, which requires employers to "reasonably accommodate" employees' religious practices unless it would cause the employer "undue hardship"); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (finding state tax exemption constitutional).

[122] The decision, 475 U.S. 503 (1986), was overturned by Congress at 10 U.S.C. § 774 (1988).

made to the *Smith* decision, at both state and federal levels. In 1991, Oregon amended its controlled substance statute to permit religious use of peyote.[123] And in 1994, Congress amended the American Indian Religious Freedom Act to include an explicit protection for the ritual use of peyote by Native Americans (the AIRFA Amendment).[124]

These legislative accommodations are common[125] and legitimate.[126] Legislatures, both state and federal, routinely determine that for legislation

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[123] OR. REV. STAT. § 475.992 (Supp. VI 1994). This section provides that it is an affirmative defense to any prosecution for manufacture, possession, or delivery of peyote if it is used for religious purposes.

[124] 42 U.S.C.S. § 1996a (Supp. 1995). The American Indian Religious Freedom Amendments of 1994 provide, in part:

> Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes is lawful and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession, or transportation, including but not limited to, denial of otherwise applicable benefits under public assistance programs.

Id.

In congressional debates on the bill, it was clear that the *Smith* decision prompted the action. Congressman Richardson stated that the bill

> makes statutory the protection now provided by Federal regulation and the laws of 28 states for the religious use of peyote by Indian practitioners. This legislation to protect the first amendment right of Indians to use peyote as a sacrament is made necessary by the ruling of the Supreme Court of the United States in the case of Employment Division v. Smith, 494 U.S. 872 (1990).

140 CONG. REC. H7156 (daily ed. Aug. 8, 1994).

[125] *See supra* note 121.

[126] Professor Hamilton writes:

> When Congress acts under its Article I enumerated powers, it has an obligation to act consistently with the principles of the First Amendment. Hence, legislatures should have the power explicitly noted in Employment Division v. Smith to carve exemptions for particular religions from generally applicable laws. Congress may even be permitted to exceed the Court's threshold definition of First Amendment guarantees, if it is acting pursuant to one of its enumerated powers.

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 363 (1994).

within their powers, they can choose to exempt or accommodate religion so long as it does not violate the Establishment Clause of the First Amendment. In fact, when Oregon amended its law to provide for a ritual peyote exemption, it joined over twenty-five states that already had such an exemption.[127] Religious exercise is also protected within detailed, far-reaching statutory schemes, such as those that prohibit discrimination on the basis of religion, inter alia, in housing, education, and employment.[128]

But RFRA was different. It sought not to respond to the holding of *Smith* with an exemption or a detailed statutory scheme, but instead to respond directly to the Court's new interpretive approach, to its narrowed determination of what falls within the protective scope of the Free Exercise Clause. Because of this goal, the problems facing the drafters of RFRA were unprecedented. How does one draft a statute that forces the judiciary to undo the harm of the *Smith* decision? How does one draft a statute that widens the scope of the Free Exercise Clause? How does one draft a statute to ensure that all courts, state and federal, will employ the balancing approach whenever any religiously neutral law burdens the exercise of religion? And is it necessary—or even possible—for such a statute to be a self-contained one, establishing its own substantive religious exercise rights and its own balancing test for enforcing those statutory rights?

The RFRA drafters purported to solve those problems by asserting several unique propositions: that Congress may determine what is within the scope of a constitutional protection contrary to the Supreme Court's reading of that scope; that it may determine the proper interpretive approach for the judiciary to define constitutional doctrine; that it may do this simply by asserting the formalities of a cause of action; and that it may, in one legislative act, amend all existing federal and state law.

A. *Congress Restates the Free Exercise Clause*

As we have seen, the core of the *Smith* ruling lies in its textual reading of the Free Exercise Clause as categorically excluding from its scope those laws that are religiously neutral and generally applicable in nature.[129] This reading is consistent with what was employed in some of the earliest free exercise cases.[130] But it is a reading vigorously contested by Justice O'Connor and the dissenters in *Smith*. The Free Exercise Clause, writes Justice O'Connor, "does not distinguish between laws that are generally applicable and laws that target

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[127] *Smith*, 494 U.S. at 917.

[128] *See generally* Ryan, *supra* note 72.

[129] *See supra* note 92 and accompanying text.

[130] *See supra* notes 94–98 and accompanying text.

particular religious practices."[131] The Court's free exercise cases "have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."[132]

The cornerstone of RFRA is its appropriation of Justice O'Connor's vision of the Free Exercise Clause. Section 1(a)[133] of RFRA states:

> **In general**
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . .[134]

Standing by itself, this general statement adopts in statutory form the pre-*Smith* scope of the Free Exercise Clause.[135] Indeed, that is precisely what RFRA wishes to restore. It should come as no surprise, then, that this statement constitutes—and is intended to constitute—total disagreement with Justice Scalia's narrow reading of the Clause.

Thus, we are witness to a direct conflict between Congress and the Supreme Court over the proper judicial reading of a constitutional provision.[136] Congress is, of course, entitled to express its own independent views on constitutional matters in the course of enacting legislation.[137] But the RFRA "general" statement, in the context of the bitter legislative reaction to *Smith*, is

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[131] Employment Div. v. Smith, 494 U.S. 872, 894 (O'Connor, J., concurring in judgment).

[132] *Id.*

[133] The Findings and Purposes of RFRA can be found at 42 U.S.C. § 2000bb (Supp. V 1993). The operative sections are found at §§ 2000bb-1 to 2000bb-4. In this Article, a reference to Section 1 means 2000bb-1 and so on.

[134] 42 U.S.C. § 2000bb-1(a) (Supp. V 1993). Section 1 goes on to say that government can substantially burden a person's exercise of religion only if the government demonstrates that application of the neutral law "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1)–(2) (Supp. V 1993).

[135] This close connection to the Constitution has prompted the metaphor of statutes that orbit the Constitution. *See* Lupu, *Statutes Revolving*, *supra* note 116.

[136] Other attempts to legislate in direct contradiction to constitutional decisions have failed. *See, e.g.*, Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982) (regarding the Human Life Bill that sought to overturn Roe v. Wade).

[137] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 39 (2d ed. 1988) (Congress has "the power and the duty to interpret the document [the Constitution] in a way that may command the respect of others."). But Dean Paul Brest has observed that Congress should not contradict judicial value judgments having a constitutional dimension. Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 105 (1986).

the epitome of Congress' disagreement with this "infamous" and "mischievous" decision. It has no greater substance than as a statement of what Congress deems to be the better judicial reading of the Free Exercise Clause, a reading found in the pre-*Smith* decisions of the Supreme Court and expressed in Justice O'Connor's separate opinion in *Smith*. The general statement thus stands as a legislative rewrite of the Free Exercise Clause.

B. *The RFRA "Findings"*

The so-called "findings" expressed in RFRA further illustrate that this statute is concerned solely with forcing a judicial correction of the *Smith* "misinterpretation" of the Free Exercise Clause. Contrary to what the *Smith* majority found, Congress, for the purposes of its own Free Exercise Clause analysis, "found":

> (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution[138]

and;

> (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.[139]

An additional finding makes an obvious reference to the appropriate standard of review to be employed in cases arising under the Free Exercise Clause and expresses the constitutional value judgment that:

> (3) governments should not substantially burden religious exercise without compelling justification.[140]

RFRA next makes two remarkable findings. These findings are remarkable in the sense that these are statements that might appropriately be found in a judicial opinion overruling *Smith* and restoring the use of the balancing test where neutral laws substantially burden religious exercises. The first of these findings focuses directly on the *Smith* decision and the congressional dissatisfaction therewith:

> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme

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[138] 42 U.S.C. § 2000bb(a)(1).
[139] *Id.* § 2000bb(a)(2).
[140] *Id.* § 2000bb(a)(3).

> Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.[141]

That finding bears more than a symbiotic relationship to Justice O'Connor's complaint that the *Smith* majority had disregarded what she deemed to be the established constitutional doctrine of the Free Exercise Clause.[142]

The second finding vents a pure judicial-type value judgment of the feasibility of the judicially created compelling governmental interest. Tracking nearly verbatim the language of Justice O'Connor's concurring opinion in *Smith*,[143] Congress decided:

> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[144]

Many statutes contain findings that criticize the Court's *statutory* interpretation in a particular case.[145] But where a *constitutional* decision is criticized, findings are factual. The AIRFA Amendment, for instance, sets forth the importance of peyote as a sacrament for Native Americans, the protections that exist under federal and state law, the *Smith* decision's refusal to protect this use under the Constitution, and the harmful effects of inadequate and spotty

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[141] *Id.* § 2000bb(a)(4). In contrast, the AIRFA Amendment finds that *Smith* "held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard." 42 U.S.C.S. § 1996a(a)(4) (Supp. 1995).

[142] Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in judgment). See also Justice Blackmun's dissenting complaint that the *Smith* majority "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908.

[143] Justice O'Connor wrote, "[C]ourts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[144] 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993). In earlier versions of RFRA, this finding stated that "the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances." For obscure reasons, the reference to *Sherbert* and *Yoder* was omitted in the final draft, to be replaced by the words "in prior Federal court rulings." *See* Lupu, *supra* note 70, at 196. However, the first "purpose" of RFRA (§ 2000bb(b)(1)), continues to refer to the compelling interest test as set forth in *Sherbert* and *Yoder* as the test to be restored.

[145] *See supra* note 7.

statutory protection.[146] In stark contrast, the RFRA findings do not specify serious governmental intrusions upon religious liberty that can be rectified only by a statutory creation of substantive religious rights beyond those the Court is willing to recognize. Even though numerous examples of bad court decisions in the post-*Smith* period were brought before Congress in the RFRA hearings, Congress chose not to address any of them directly. RFRA's findings are not about discovering facts difficult for courts to see, but rather about the efficacy of the judicial standard of review.[147] The RFRA findings do nothing more than trace and evaluate the judicial history of the Free Exercise Clause, particularly during the pre-*Smith* era. As described by one commentator, these findings merely "affirm the historic importance of religious freedom and the sensibility of the compelling interest test as a way of balancing religious liberty and competing governmental interests."[148]

As such, these findings are not true legislative findings but rather "a congressional understanding of constitutional values that differs from the Supreme Court's."[149] RFRA's concern is not to correct a decision on its merits, but rather to reject one interpretive technique—the categorical approach—in favor of another—the balancing approach. RFRA's drafters explicitly rejected the case-by-case approach in which legislative response would focus on a "piecemeal exemptions" process because it would be time consuming, would embroil religious groups in constant controversy, and would miss the real evil: the narrowed reading of the Free Exercise Clause and concomitant rejection of the balancing test.[150] Thus, given the sweeping jurisprudential and interpretive nature of the statute, the findings can serve only to assert Congress' judgment that a different meaning of the Free Exercise

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[146] 42 U.S.C.S. § 1996a(a)(1)–(5) (Supp. 1995); *see also* the congressional findings in the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621–634 (1994). Those findings, as set forth in EEOC v. Wyoming, 460 U.S. 226, 231–32 n.3 (1983), detailed the individual and social costs of age discrimination, matters which confirmed the extensive fact-findings undertaken by the Executive Branch and Congress. There are no such fact-findings accompanying RFRA.

[147] The Court has often deferred to Congress' superior fact-finding capacity to investigate and uncover problems that courts cannot detect on a case-by-case basis. *See infra* part VII.B.

[148] David M. Ackerman, *The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* 22 (Congressional Research Service, April 17, 1992).

[149] Conkle, *supra* note 15, at 67.

[150] *Id.* at 230. ("RFRA would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature."); *see also* Berg, *supra* note 5, at 12–13. *Cf.* Hamilton, *supra* note 126 (RFRA's "across-the-board treatment suggests negative ramifications for First Amendment freedoms that the statute-by-statute scenario does not.").

Clause would better protect religious claimants in litigation.

But why should the Supreme Court, or any other court, be expected to defer to these legislative expressions of displeasure with *Smith*'s limited conception of the Free Exercise Clause? There is certainly no indication that by these findings Congress is expressing "a specially informed legislative competence"[151] in order to determine what the Free Exercise Clause means or what level of scrutiny the courts should use in evaluating religiously neutral laws. Nor does the legislative history of RFRA provide any more legislative substance or expertise to these findings. The committee reports of both the Senate and the House of Representatives simply track the statutory findings by giving fuller narrations of the differing viewpoints expressed by the Justices in *Smith*, by giving more lavish legislative praise for the Court's past use of the compelling governmental interest test, and by expressing more fulsome legislative dislike of *Smith*.[152]

And in virtually identical language, both committees concluded that (1) the effect of the *Smith* decision has been to hold laws of general applicability that operate to burden religious practices to "the lowest level of scrutiny employed by the courts: the 'rational relationship test,' which requires only that a law must be rationally related to a legitimate State interest," and (2) by lowering the level of scrutiny, *Smith* "has created a climate in which the free exercise of religion is continually jeopardized."[153] As these reports and the testimony that preceded them attest, "[t]he debate over RFRA was not about what Congress might do to ensure religious liberty but rather about the *Smith* Court's implicit overruling of prior free exercise doctrine."[154]

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[151] Katzenbach v. Morgan, 384 U.S. 641, 656 (1966).

[152] SENATE REPORT, *supra* note 4, at 4–7; HOUSE REPORT, *supra* note 4, at 6–9.

[153] SENATE REPORT, *supra* note 4, at 7–8. Substantially identical language also appears in the HOUSE REPORT, *supra* note 4, at 5–6. The Senate Report adds a rather provocative statement that "State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right." SENATE REPORT, *supra* note 4, at 8. To that sentence is appended a quotation from West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), stating that the very purpose of the Bill of Rights was to withdraw certain subjects [presumably including the free exercise of religion] from the vicissitudes of political controversy and "to place them beyond the reach of majorities and officials." That *Barnette* sentence then concludes by stating that the purpose of the Bill of Rights was also to "establish [those subjects beyond the reach of government officials] as legal principles to be applied by the courts." *Id.* *Barnette* is certainly no authority for the proposition that Congress can establish such legal principles "to be applied by the courts."

[154] Hamilton, *supra* note 126, at 385.

C. *The RFRA Restoration "Purpose"*

In light of the foregoing "findings," RFRA states that Congress has two "purposes" in mind:

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. [155]

The first of these statutory "purposes" accurately reflects the congressional conception of what RFRA is designed to accomplish. Again, the Senate and the House reports use virtually identical language to explain the restorative purpose of RFRA. The Senate report, for example, states that RFRA "is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest."[156] The purpose, then, is to restore judicial balancing as constitutional doctrine.

And which branch of government is to implement that restoration of the compelling interest test? Both the Senate and the House Reports make clear that it is the job of the courts to do so. It is the "expectation" of both the Senate and House committees, say the respective reports, that "the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest."[157]

RFRA makes that "expectation" even more precise by specifying, by way of a statutory "purpose," that the courts should act to restore the compelling interest test as set forth in two pre-*Smith* judicial precedents, the *Sherbert* and the *Yoder* decisions.[158] In that restorative process, of course, the courts are also

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[155] 42 U.S.C. § 2000bb(b)(1)–(2) (Supp. V 1993).

[156] SENATE REPORT, *supra* note 4, at 8. Substantially identical language appears in the HOUSE REPORT, *supra* note 4, at 6.

[157] The actual quotation is from the SENATE REPORT, *supra* note 4, at 8–9. Virtually identical language appears in the HOUSE REPORT, *supra* note 4, at 6–7.

[158] 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993). The two cases cited in this section are Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972). *Id.* See Berg, *supra* note 5, for a discussion urging courts interpreting RFRA to replicate the "high-water mark" of free exercise protection as exemplified by these cases.

expected to forget and ignore the *Smith* decision and any stare decisis qualities it may have.[159] By implication, courts are also expected to ignore *Goldman v. Weinberger*[160] and *O'Lone v. Estate of Shabazz*.[161] These cases rejected the compelling interest test for free exercise cases in the military and prison contexts, respectively.[162] In sum, Congress is saying to the judiciary: (1) replace *Smith*'s categorical reading of the Free Exercise Clause with the pre-*Smith* balancing approach with respect to religiously neutral laws; (2) restore and use the pre-*Smith* balancing approach as set forth in *Sherbert* and *Yoder* and ignore other pre-*Smith* decisions that, through definitional balancing, failed to protect religious exercise; and (3) disregard if not overrule the *Smith*, *Goldman*, and *O'Lone* decisions.

Finally, RFRA provides its own version of the compelling interest test. This test echoes varied ad hoc balancing formulations set forth in *Sherbert*, *Yoder*, and elsewhere.[163] Labelling the test as an "exception" to RFRA's "general" restatement of the Free Exercise Clause, Section 1(b) provides:

> **Exception**
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least

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[159] See Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 284 (1995) for the argument that RFRA wipes out not only the narrow reading of *Smith* that leaves religiously neutral laws outside the Free Exercise Clause but also those applications of the compelling interest test that are watered-down versions of strict scrutiny (what we have referred to as the "definitional" balances, *supra* part IV.B.).

[160] 475 U.S. 503 (1986).

[161] 482 U.S. 342 (1987).

[162] *See supra* notes 83–84 and accompanying text.

[163] The Supreme Court never employed a single formulation of the balancing test neatly and consistently. *See supra* part IV. The language here is an approximation of the strict scrutiny test, perhaps closest to that articulated in Thomas v. Review Bd., 450 U.S. 707 (1981); nevertheless, the main elements of the balance were introduced in *Sherbert* and have appeared in most of the cases.

In addition to setting up a tension between the statutory statement of the balancing test and the way it appears in precedent, RFRA contains an internal tension. The reference to *Sherbert* and *Yoder* in the "Purposes" section is inconsistent with the reference to "prior federal court rulings" in the "Findings" section, since the former exemplify ad hoc balancing and the latter contain definitional balancing. *See supra* part V.B.; *see also* Lupu, *supra* note 70, at 196–98; Lupu, *Statutes Revolving*, *supra* note 116. In any event, while RFRA is obviously not a "restoration" of the case law as applied on the eve of *Smith*, it *is* a restoration of the interpretive methodology (and, inexorably, the constitutional doctrine) of the *Sherbert-Yoder-Thomas* regime.

restrictive means of furthering that compelling governmental interest.[164]

Whatever ambiguities may adhere to this statutory definition of the compelling interest test, the fact remains that the test itself is solely a creature of the judicial function of reading and interpreting constitutional provisions. Does Congress have the right to dictate the interpretive technique—indeed the constitutional doctrine—by which the Supreme Court acts as the supreme "case or controversy" arbiter of the Free Exercise Clause?

It is well settled that Congress cannot tell the Court how to interpret the Constitution, as this would be "an obvious intrusion on [judicial] authority."[165] Yet, RFRA is described as "a quasi-constitutional statute"[166] and as "a statute designed to perform a constitutional function[,] . . . designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist *if the Constitution were properly interpreted.*"[167] How can these two positions be reconciled? Proponents explained that RFRA "is not trying to overturn the Court's ruling as a matter of constitutional law . . . . Instead, Congress is using its powers to create a statutory right where the Court refused to declare a constitutional one."[168]

The new substantive rights under the statute, so the argument goes, supplement the "floor" of constitutional protection; they do not replace it. The constitutional doctrine of free exercise is frozen at *Smith* and *Hialeah*.[169] The body of law that will develop around RFRA's terms—"substantial burden," "compelling governmental interest," and "least restrictive alternative"—will be *statutory*, not constitutional, interpretation.[170] An all-important question, then,

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[164] 42 U.S.C. § 2000bb-1(b)(1)-(2) (Supp. V 1993). For discussion of this section on the least restrictive alternative, see Idleman, *supra* note 116, at 280-82; Lupu, *supra* note 70, at 194-95.

[165] Berg, *supra* note 5, at 63.

[166] Laycock, *supra* note 116, at 254.

[167] Laycock & Thomas, *supra* note 5, at 219 (emphasis added).

[168] Berg, *supra* note 5, at 63; *see also* Laycock, *supra* note 116, at 246, 251-53.

[169] This argument makes it possible to defend a new, abstracted statement of the balancing test without stare decisis concerns.

[170] The Senate Report adopts the assertion that Congress seeks not to affect constitutional interpretation. It states:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

is whether RFRA indeed creates such a supplementary statutory or "quasi-constitutional" right.

D. *The RFRA "Claim or Defense" Purpose*

Critical to maintaining this distinction between RFRA and the Free Exercise Clause is the argument that RFRA does establish an independent, substantive statutory right of action. Congress was satisfied that it had created such a right when it stated RFRA's second "purpose" was to provide "a claim or defense to persons whose religious exercise is substantially burdened by government."[171] In Section 1(c), this "claim or defense" reference is enlarged by providing:

> **Judicial relief**
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution. [172]

A burden "in violation of this section" refers to sections 1(a) and (b), which provide that government shall not substantially burden religious exercise, even by general laws, unless it has a compelling interest and no less restrictive alternative.[173] Under section 1(c), then, a person can assert a claim or defense that some religious exercise has been burdened in the absence of a compelling interest. RFRA further makes plain that the only kind of religious exercise to which the claim or defense relates is an "exercise of religion under the First Amendment to the Constitution," presumably as recognized by the Supreme Court.[174]

Taken together, these provisions are said to show RFRA to be "a replacement for the Free Exercise Clause . . . as universal as the Free Exercise Clause."[175] Instead of bringing a constitutional action under the Free Exercise Clause, one should bring a claim under RFRA. Under section 1(c), the balancing approach is to be implemented by courts in the course of ordinary

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SENATE REPORT, *supra* note 4, at 14 n.43.

171 42 U.S.C. § 2000bb(b)(2) (Supp. V. 1993).

172 *Id.* § 2000bb-1(c).

173 *Id.* § 2000bb-1(a), (b).

174 *Id.* § 2000bb-2(4). In *Smith*, the Supreme Court assumed that peyote ingestion was an exercise of the respondents' religion, although refusing to decide if such an exercise was "central" to their religion. Employment Div. v. Smith, 494 U.S. 872, 886–87 (1990).

175 Laycock & Thomas, *supra* note 5, at 219.

"judicial proceedings" brought to challenge or enforce some religiously neutral law or rule. Congress expects that any federal or state court, confronted with a free exercise claim properly raised in any kind of judicial proceeding,[176] will apply the RFRA restatement of strict scrutiny (and not the Free Exercise Clause) and "will look to free exercise cases decided prior to *Smith* for guidance" in following that test.[177] In this way, RFRA purports to "enact[] a statutory version of the Free Exercise Clause."[178]

Do these provisions demonstrate that Congress has successfully created in RFRA an independent, substantive right that is enforceable by statute? Or does RFRA modify a Free Exercise Clause analysis by changing the applicable constitutional doctrine? Admittedly, this is a strange inquiry. The "claim or defense" provison certainly meets the formal requirements of stating a "right of action."[179] But such language by itself does not a substantive statute make. Is this claim or defense attached to a substantive right? What is the nature of the right conferred by RFRA? Read against the backdrop of the Findings and Purposes sections, which repeatedly criticize the Court's interpretive methodology, the "right of action" is open to question.

During congressional debates, proponents repeatedly stated that RFRA is directed solely toward re-establishing the pre-*Smith* compelling interest test as the standard of review for use by the courts in addressing free exercise claims in light of neutral and generally applicable laws. Senator

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[176] *See, e.g.*, DONALD L. DOERNBERG & C. KEITH WINGATE, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS 12 (Supp. 1994) ("[A]lthough the statute purports to create a claim, it does not clearly indicate where litigants can pursue such claims. By any measure, claims under the statute qualify as federal questions for jurisdictional purposes; perhaps that is why Congress felt that no jurisdictional provision was appropriate.").

[177] *See* SENATE REPORT, *supra* note 4, at 8–9. A somewhat similar hope or expectation that state courts would not follow the most recent Supreme Court precedents was expressed by proponents of legislation that would have stripped the Supreme Court and all other federal courts of jurisdiction over cases involving voluntary school prayers. *See* Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 197 (1981); *see also* Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 505–07 (1983).

[178] Laycock, *supra* note 116, at 235.

[179] *Cf.* American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1988 & Supp V. 1993). "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988). This Act was later amended to provide a clear statutory right of action to protect ritual use of peyote, see *supra* note 124 and accompanying text.

Kennedy noted during the Senate debate, "[t]he act creates no new rights for any religious practice or for any potential litigant."[180] And Senator Lieberman added, "RFRA does not create a new legal standard."[181] The remarks of Senator Bradley on the floor of the Senate are typical of many others:

> RFRA bolsters the free exercise of religion by restoring the legal standard that was applied to the decisions which preceded *Smith*, the compelling interest standard. RFRA simply insures that courts will protect the fundamental right to freely exercise one's religion at an appropriate level of scrutiny. RFRA does not dictate the outcome of any particular case; rather, it allows each case to be judged on the merits within the proper framework.[182]

Taking these statements at face value, RFRA creates no new substantive religious rights, privileges or entitlements. Nor does it add to or supplement any such rights. There is plainly no new or different kind of exercise recognized by RFRA to which a claim or defense might be made.

A substantive right—an exemption, for instance—might *result* from the balancing done by a court in a given case brought under RFRA. The "claim or defense" provision, coupled with the balancing test, then becomes the mechanism by which Congress induces courts to create substantive constitutional rights; but no pre-existing rights are thereby enforced.[183] Such pressure on courts to produce new rights is an anomaly.

One proponent has explained that the statute is "an across-the-board right to argue for religious exemptions and make the government carry the burden of proof when it claims that it cannot afford to grant exemptions."[184] But with this formulation, no "right" is established; neither is any governmental behavior limited or prohibited. When Congress creates substantive rights by way of exemption, it is determining that government possesses no reason good enough to enforce the law against religious conduct. But RFRA does not involve Congress in evaluating governmental interests. The "across the board right to argue for

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[180] 139 CONG. REC. S14351 (daily ed. Oct. 26, 1993).

[181] 139 CONG. REC. S14462 (daily ed. Oct. 27, 1993).

[182] *Id.* at S14469.

[183] This confusion is evident in the case law developing under RFRA. *Compare* Hunt v. Hunt, 648 A.2d 843, 850 (Vt. 1994) (RFRA overrules *Smith*) and Phipps v. Parker, 1995 U.S. Dist. LEXIS 3869 (W.D. Ky. 1995) (RFRA overrules *O'Lone*) *with* Bessard v. California Community Colleges, 867 F. Supp. 1454, 1467 (E.D. Cal. 1994) (clear distinction between RFRA as statute and *Smith* as constitutional law).

[184] Laycock, *supra* note 116, at 230.

exemptions" makes no claim that particular government action should not interfere with religious exercise; only that whatever the interest, it must be found by a court to be sufficiently compelling to override the free exercise claim. By extending the balancing approach to neutral, generally applicable laws, RFRA is not evaluating government interests. It is only redefining the meaning of "free exercise" as construed by the Court.[185]

RFRA creates a "claim or defense" that the RFRA version of the Free Exercise Clause has been violated; however, it creates no newly-minted RFRA right of action or judicial proceeding. Nor is there a functional equivalent of such a right of action. A RFRA violation is simply a statutory mechanism for conveying to the courts the expectation of Congress that the courts will ignore the *Smith* precedent and will use the compelling governmental interest test when confronted with a free exercise claim raised in some non-RFRA kind of judicial proceeding.

The statute confers the right to have one's free exercise claim adjudicated under a balancing approach—that is, the right to have a court employ a particular interpretive method. It is the right to have a strict scrutiny standard of review employed in free exercise cases. But this is no more than the "right" to have courts employ Congress' own reading of the Free Exercise Clause. A standard of review is subordinate to the recognition of a right. It cannot itself constitute the right. In a suit brought under RFRA, one does not simply assert a claim or defense that some religious exercise has been burdened in the absence of a compelling interest. In essence, one asserts a claim or defense that the Free Exercise Clause, as Congress interprets it, has been violated. Thus, RFRA is, as one commentator has noted, "a bare standard of review yoked to no particular policy arena within which Congress is constitutionally empowered to act."[186] This absence of linkage to any independently created right is

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[185] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 456 (1994):

> Congress made no effort to tailor a solution to the demands of any demonstrated imposition on religious activity; indeed, Congress did not even try to *identify* any specific instance of mistreatment that RFRA would remedy. To the extent that Congress made any judgment at all, it was an interpretive, doctrinal judgment about the jurisprudential merits of pre-Smith Supreme Court precedent, not about burdens facing religious believers.

For a discussion of how Congress can evaluate government interests, see Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 304 (1982).

[186] Hamilton, *supra* note 126, at 364 (arguing that no enumerated power

nowhere more evident than in the RFRA attempt to mask the restoration of the balancing approach as a "claim or defense" that RFRA has been violated.

Congress' instruction to courts on the standard of review in free exercise cases is tantamount to telling the judiciary how to interpret the Clause, for the balancing approach in the free exercise area operates as the constitutional doctrine.[187] Under *Sherbert*, the constitutional meaning of free exercise was that no one shall be burdened in their free exercise—even by generally applicable, facially neutral laws—without a compelling interest. That was the substantive constitutional law, and remained so until *Smith*. To have a court apply strict scrutiny is not a right in itself that can be separated out from constitutional meaning. RFRA is completely emptied of substance as an independent statute precisely because it is filled with substantive constitutional doctrine.

During the RFRA hearings, the balancing test was often treated as a "mere" standard of review or burden of proof attached to a statute to give guidance to courts, rather than the very heart of the constitutional doctrine. In a colloquy between ACLU President Nadine Strossen and Congressman Washington, Ms. Strossen described the compelling governmental interest as simply "a heavy burden of proof."[188]

> Mr. Washington: And when you take that standard [strict scrutiny judicial review] and you take the evening gown off the standard that is floating around and in metaphysical constitutional terms is called compelling State interest it amounts to nothing more than a burden of proof.
>
> Ms. Strossen: Exactly.
>
> Mr. Washington: And it is a higher burden of proof than the Supreme Court in its wisdom, or for the lack of it, has found to use in certain cases involving religion. Right?
>
> Ms. Strossen: Exactly.
>
> . . . .
>
> Mr. Washington: . . . And the only question is that . . . on the standard of review and whether the Congress has the authority to establish a burden of proof or standard of review, we do that routinely in almost every piece of legislation that is passed. We contemplate what is likely to be the tugs and

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authorized Congress to pass RFRA).

[187] *See supra* part IV.A.

[188] *House Committee Hearings*, *supra* note 8, at 103.

> balances and pulls and pushes on judicial interpretation and we direct the Court's attention, and rightfully so, to how we wish to have it interpreted. There are standard rules of statutory construction. There are rules that apply when the Constitution meets a statutory construction. And it is not only the right but the duty of Congress to give guidance to the Court in that respect. Would you not agree?
>
> Ms. Strossen: I completely agree, especially in light of the fact that all of you take an oath to uphold and defend the Constitution, and it is particularly important that you do so in a situation such as this when that is precisely what the Supreme Court, with all due respect, has failed to do.[189]

Of course Congress has legislative power to set standards of review[190] and to allocate burdens of proof with respect to statutory schemes of its own creation.[191] Congress can even direct the interpretation of the statute's provisions.[192] But the power to set these and other controls on the judiciary[193]

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[189] *Id.* at 105–06. While hearing colloquy is not very high in the hierarchy of legislative history sources (ranking lower than committee reports, sponsor statements and rejected proposals), OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 444 (2d ed. 1993), this colloquy nonetheless illustrates the attempt to characterize RFRA as a routine setting of a burden of proof.

[190] This usage of "standards of review" refers to the review by a court over a *prior tribunal's (or agency's)* decision. A completely different usage of the term is intended when "courts perform their *Marbury v. Madison* function of checking a legislative choice for its permissibility under the Constitution (i.e., constitutional review by the courts in general over legislative-like action) . . . [where] standards of review [are used] to test the substantive decision[s]." 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §1.03 at 1-27-1-28 (1992). "Standards of review" as commonly used in statutes, such as the Administrative Procedures Act, 5 U.S.C. §§ 500–576 (1994) refer to the "roles and functions between courts (or between courts and agencies) rather than that special application of court review over legislation or other political action that is questioned constitutionally." *Id.* at 1-28-1-29; *see* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (a reviewing court can void agency actions, findings and conclusions that do not meet the standards of review set out in the Administrative Procedures Act).

[191] The Supreme Court has generally deferred to Congress' legislative allocation of burdens of proof and setting of standards of proof. JACK B. WEINSTEIN ET AL., CASES AND MATERIALS ON EVIDENCE 1046 (7th ed. 1983). Where Congress has spoken, the court has deferred to the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts, absent countervailing constitutional restraints. *See* Vance v. Terrazas, 444 U.S. 252, 265 (1980). For the distinction between standards of proof, appellate standards of review, and constitutional standards of review, see CHILDRESS & DAVIS, *supra* note 190, at 1-25-1-27.

[192] For a discussion of statutory directions for the courts, see 1A NORMAN J.

presupposes an independent, substantive statute, the interpretation and implementation of which is being directed. RFRA's standard of review or burden of proof serves no statutory scheme or right of action for enforcing new or additional free exercise rights. Congress cannot engage in these tasks when it is engaged in independent *constitutional* interpretation. Congressman Washington and Ms. Strossen confuse the everyday lawmaking activities with extraordinary measures to correct the Supreme Court's failure to "uphold and defend" the Constitution. They ignore the fact that RFRA's "standard of review" or "burden of proof"—which government must meet—is actually a judge-made test developed in the context of defining constitutional text and is itself determinative of constitutional doctrine.

Thus, RFRA is not a free-standing statute. It has no substance. It creates no new statutory free exercise rights. It gives rise to no new statutory right of action, replete with its own standard of review. The "claim or defense" that RFRA purports to create relates to nothing more than RFRA's rewrite of the Free Exercise Clause. It is but the vehicle by which Congress seeks to ride into the judicial reservation. Having arrived there, RFRA attaches itself to what may often be a totally independent judicial proceeding, wherein a party making a free exercise claim or defense foreswears any reliance on the Free Exercise Clause of the First Amendment and relies exclusively on RFRA. The statute thereupon directs the court to follow what Congress believes is a better way of reading and applying the Free Exercise Clause.

E. *RFRA: A Super-Statute*

RFRA is truly awesome in its statutory sweep.[194] There is no federal, state or local governmental unit that escapes its reach. There is no federal, state or local law or rule that is exempt from the RFRA standard of review. There is no federal or state court, whether it be a trial or appellate court, that is free to follow the *Smith* version of the Free Exercise Clause or to ignore the

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SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 27.01 (5th ed. 1992); HETZEL, *supra* note 189.

[193] Congress undoubtedly has the power to direct courts on statutory interpretation in general and to nullify the effects of Supreme Court cases that interpret statutes in ways Congress does not condone. *See supra* note 7. Congress also establishes and facilitates the workings of the federal court system through Title 28 of the United States Code.

[194] Professor Paulsen refers to it as a "sweeping 'super-statute' cutting across all other federal statutes" and uses the metaphor of a river cutting deeply through all the law; hence the play on words for the title of his article, *A RFRA Runs Through It.* Paulsen, *supra* note 159.

compelling governmental interest test where a neutral, generally applicable law is challenged under RFRA. Even the Supreme Court of the United States is expected to shape up, to restore the pre-*Smith* reading of the Clause, and (hopefully) to overrule *Smith*.

The RFRA proposition that government shall not substantially burden religious exercise, unless it proves a compelling governmental interest, is given life by the broadest possible definition of "government." Section (2)(1) states that the term "government" includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State."[195] RFRA's legislative history also makes clear that prison and military units of government are included within the reach of this statute, which nullifies the effect of *Goldman v. Weinberger* and *O'Lone v. Estate of Shabazz*.[196] Congress debated and defeated an amendment that would have exempted prisoners from RFRA's protection, and to date courts have heard dozens of RFRA cases brought by prisoners.[197]

In a provision unparalleled in American statutory history, Section (3)(a) declares that RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."[198] Thus, in one fell swoop, RFRA attaches itself to every statute, law, ordinance, and rule in the land, as well as those that may be enacted in the future. And insofar as federal statutes are concerned, RFRA purports to incorporate its standard of review of religious exercise claims into every law appearing in the United States Code.[199] In effect, Congress here intends to amend every federal statute wherein a religious exercise claim might conceivably be made. As for future legislation, Congress must specifically exclude RFRA application; otherwise, RFRA will

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[195] 42 U.S.C. § 2000bb-2(1) (Supp. V 1993).

[196] SENATE REPORT, *supra* note 4, at 9–15; HOUSE REPORT, *supra* note 4, at 8.

[197] The prison amendment was rejected in part because Congress believed courts would find the government's interest in prison security and order to be compelling. *See* Whitbeck, *supra* note 5, at 858–62; Berg, *supra* note 5, at 68–69. On developing case law, see Lupu, *supra* note 70, at 203–05.

[198] 42 U.S.C. § 2000bb-3(a) (Supp. V 1993). Section 3(b) goes on to provide that "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." *Id.* § 2000bb-3(b) (Supp. V 1993).

[199] "Rather than putting a guarantee of religious freedom in every statute, Congress dealt with the issue universally ahead of time." Berg, *supra* note 5, at 62. But see Hamilton, *supra* note 126, at 366 for the problems that this super-statute characteristic of RFRA creates under the enumerated powers doctrine.

apply automatically.[200]

To complete the broad spectrum of coverage, Section 1(c) provides that any person whose religious exercise has been burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[201] Given the fact that most religious exercise complaints arise out of burdens imposed by state laws, Section 1(c) obviously includes judicial proceedings in state courts. And such state law complaints, as well as complaints involving federal laws, clearly can and do arise in federal judicial proceedings. Since state and federal judicial proceedings do not necessarily end with the state or lower federal court rulings, the judicial proceedings mentioned in Section 1(c) must include proceedings before the Supreme Court of the United States. To all these courts, RFRA says: Ignore the *Smith* ruling, and apply the pre-*Smith* standard of review where substantial burdens on religious exercise might result from rules of general applicability.[202] Congress' message is loud and clear:[203] The Supreme Court "should not misconstrue the Constitution."[204]

F. *The RFRA Difference: Comparison with Other Statutes*

Congress may protect, by statute, constitutional values over and above the Supreme Court's "floor."[205] Proponents of RFRA argue that the statute is analogous to existing statutes that function in this way, particularly the Voting Rights Act (VRA). In a similar vein, Professor Laycock has argued that

> [t]he structure of RFRA is entirely parallel to the structure of the Voting Rights Acts. In each context, the Supreme Court requires plaintiffs to prove facial discrimination or actual discriminatory motive to show a constitutional violation. And in each context, Congress created a statutory

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[200] *Cf.* 1 U.S.C. § 1, the so-called Dictionary Act, which defines certain common words used in statutes for purposes of "determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1 (1995).

[201] 42 U.S.C. § 2000bb-1(c) (Supp. V 1993).

[202] Any further development of the *Smith* doctrine is blocked. All other inconsistent free exercise doctrines developed by the Court's reading of the Clause are rendered irrelevant. RFRA, having forced its way into the judicial system, simply superimposes its statutory dictates regarding the standard of review courts should use in treating free exercise claims.

[203] *See generally* Conkle, *supra* note 15.

[204] Statement of Senator Hatch, 139 CONG. REC. S14367 (daily ed. Oct. 26, 1993); see also the congressional critiques of *Smith*, *supra* note 4.

[205] Laycock, *supra* note 116, at 246.

> right in which plaintiffs show a significant burden on their voting rights, but no bad motive and no facial discrimination, and this shifts the burden of justification back to the government. If Congress has power to dispense with proof of bad motive or facial discrimination in voting cases, I think it has power to do so in religion cases.[206]

It follows from this argument that because intentional discrimination is required in the voting rights and free exercise contexts, the VRA and RFRA are legitimate statutory responses that protect people from unintentional burdens. But this "analogy" works only at a very high level of generality. A closer look at the VRA reveals that it has little in common with RFRA, in purpose, function, structure, or concept.

RFRA imposes an obligation on the judiciary to disregard a mode announced by the Supreme Court for interpreting and applying a constitutional provision and to replace it with what Congress thinks is a "better" interpretive methodology. The VRA does no such thing. Its purpose and function are not the restatement of a constitutional provision. It dictates no substantive constitutional doctrine. It does not impose a standard of review for voting rights claims. Because it is enacted pursuant to the "enforcement" provision of the Fifteenth Amendment, it seeks to enforce the guarantee of the constitutional right to vote and in so doing repeats some of the language of that amendment as it defines the statutory right to vote regardless of "race, color, or previous condition of servitude."[207] But it does not purport to substitute a different interpretive approach for Fifteenth Amendment cases. In fact, the proscription against discriminatory effects is geared toward eliminating intentional discrimination so deeply embedded and so well masked in social and political practices that it cannot be "proven" and remedied in the context of normal constitutional adjudication.

In the free exercise area, there is no comparable linkage between intentional discrimination and resulting discrimination. Typically, a burden on religious conduct that results from a neutral, generally applicable law is attributable merely to the enforcement of that law, and not to efforts to destroy or suppress some religious practice via general legislation. We certainly have historical instances of this,[208] but in the modern regulatory state most burdens are truly "inadvertent."

The VRA is an enormous and complex statute. Its scope and detail

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[206] Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 MONT. L. REV. 145, 153 (1995).

[207] 42 U.S.C. § 1971 (1988).

[208] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Reynolds v. United States, 98 U.S. 145 (1879).

address the persistent problem of states that continue to permit and encourage racial discrimination in all aspects of voting. Its massive statutory scheme sets forth a myriad of enforcement procedures to address the myriad tools regularly used by states to impede voting by African-Americans. Specific governmental practices are controlled or prohibited, such as literacy tests, character proof, poll taxes, vote dilution schemes, residence requirements and the like. Specific protection for participation in the nomination and election process, as well as for minority languages, is recognized. Investigations of voting registration procedures are authorized. Procedures by which the Attorney General can bring suit are established. The role of the judiciary is specified.

In contrast, RFRA remains brief and general. Unlike the VRA, it does not seek to correct, contain or proscribe any identifiable governmental practices. It does not ensure that the Laotian Hmong can bury their dead without the disturbance of an autopsy, or that Native Americans can partake of their sacraments. The hearings were chock-full of examples of burdensome effects of generally applicable laws on religious practice, but RFRA does not set out to protect any specific religious exercise. It intends to protect all religious exercise that is burdened by an insufficiently important governmental interest. But it does so in a way that is no more than instruction on the meaning of the Free Exercise Clause. The VRA shares nothing with this concept of "expanding" rights.

Of course, like RFRA, the VRA depends on courts to develop a body of law after the basic structure of decisionmaking is set by Congress.[209] But comprehensive statutory schemes like the VRA cannot be "at war with the essence of the Court's constitutional judgment."[210] RFRA—on its face—contradicts the very interpretation of what it means to protect free exercise of religion.

The VRA establishes a clear statutory right, and then sets out provisions to enforce that right. Sections 1971 and 1972 define the contours of the right. Then § 1973 provides for enforcement of that right. Here, the VRA enables the statutory right to vote to be enforced as long as the "voting qualification or prerequisite to voting or standard, practice, or procedure [is] imposed or applied . . . in a manner which *results in a denial or abridgement of the right* . . . to vote."[211] Thus, we have appropriate action of Congress: the creation of an independent statutory right, the establishment of enforcement provisions, and the setting of specific limitations on government. Congress has clearly defined situations

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[209] Eisgruber & Sager, *supra* note 185, at 442.

[210] *Id.* at 443; *see also* Hamilton, *supra* note 126, at 365.

[211] 42 U.S.C. § 1973 (1988) (emphasis added).

which impair the right to vote and has set out substantive remedial measures to address them.

It has also been suggested that RFRA is similar to other statutes, such as Title VII, because they are closely related to constitutional values. But Title VII is easily distinguished from RFRA. Title VII expands the public antidiscrimination principle to include certain forms of private conduct, and it "extends, rather than duplicates, the coverage of constitutionally-based judicial doctrine. It accordingly serves a legitimate congressional purpose by bringing a circumscribed political problem (discrimination against religion in the workplace) within the ambit of judicial supervision."[212] RFRA, however, seeks to replace the Court's interpretation of the Free Exercise Clause with its own interpretation.

Some have even suggested similarities between RFRA and statutes like §§ 1983 and 1988 which are intended to provide individuals with a right of action against state governments to enforce liberties under the Bill of Rights.[213] But RFRA is easily distinguished from these statutes as well. Such statutes are not themselves the source of substantive rights; they give "a method for vindicating federal rights elsewhere conferred,"[214] that is, judicially determined. No religious rights "elsewhere conferred" are being enforced by RFRA.[215]

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[212] Eisgruber & Sager, *supra* note 185, at 460.

[213] *See* Laycock, *supra* note 116, at 246.

[214] Albright v. Oliver, 114 S. Ct. 807, 811 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

[215] While "vehicle remediation statutes" like §§ 1983 and 1988 enforce liberties, the meaning of these liberties "is that as determined by the courts, not by Congress. RFRA, in contrast, not only authorizes suits in the name of religious liberty, but also defines the substance of free exercise above and beyond the substantive parameters recognized by the Supreme Court. Indeed, RFRA embodies an interpretation of the Free Exercise Clause that was specifically rejected by the Court in *Smith* and certain prior cases. In short, because substantive congressional alteration is not the purpose or effect of these remedial enforcement statutes, it is simply mistaken to argue that they somehow establish the constitutionality of RFRA." Idleman, *supra* note 116, at 306–07.

Professor Laycock argues that there is "a constitutional violation to be remedied by RFRA. RFRA would enforce the constitutional rule against laws prohibiting the free exercise of religion. Congress can act on the premise that the exercise of religion includes religiously motivated conduct. Even the Supreme Court recognizes that much." Laycock, *supra* note 116, at 251. However, the definition of an exercise of religion is not at issue; at issue is the definition of what is included within the term "laws." The Court has a fundamentally contrary understanding of what comes within the scope of the Free Exercise Clause. So, RFRA remedies no constitutional violation because, under *Smith*, general laws do not come within the Clause's reach.

G. *RFRA: A Troubling Prototype*

RFRA is a congressional requirement that courts interpret a constitutional provision according to what Congress deems to be a preferable judicial standard of review. The implications of this requirement are staggering. Can Congress revise the First Amendment? Can it revise the entire Bill of Rights? Can Congress revise any other provision of the Constitution that has typically been given a limited meaning by the judiciary in a case or controversy?

Senator Jesse Helms, a sponsor of numerous congressional bills designed to reign in the Court's constitutional interpretations, once remarked that "[t]here is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own notions of public policy."[216] RFRA is a new and so far successful way of "skinning the Supreme Court cat." All these techniques, including RFRA, target a particular Court decision, like *Smith*, and then denounce that decision in most vituperative language. But the RFRA method of aborting a distasteful Court decision, through a direct incursion into the judicial branch, is the most innovative way of "skinning" that Congress has yet devised. For that reason, RFRA sets a dangerous prototype for future congressional fits of displeasure with Supreme Court rulings by giving impetus to future enactments of RFRA-type super-statutes.

The RFRA prototype, for example, might be useful to a future Congress concerned with ratcheting upward some of the constitutionally based equal protection rights of commercial business interests. The offending target, to be denounced along with fond echoes of the *Lochner* era, might be the Supreme Court decision in *FCC v. Beach Communications, Inc.*,[217] which held that business interests are not a

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[216] 130 CONG. REC. S2901 (March 20, 1984). Senator Helms' preferred device has been to use the Exceptions Clause of Article III to propose statutes that would strip the Supreme Court of appellate jurisdiction over cases that involve the same subject matter (such as abortion rights or voluntary school prayer) as to which the Court has rendered controversial or unpopular decisions. Usually this device would also strip the lower federal courts of original subject-matter jurisdiction over such cases. *See* Gressman & Gressman, *supra* note 177.

[217] 113 S. Ct. 2096 (1993). The Court there stated that, in areas of social and economic policy, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 2101. And the legislative choice, said the

suspect class for equal protection purposes and that economic regulations will be sustained if there is any conceivable rational basis for the classification.

Borrowing from RFRA, Congress could enact a Fundamental Economic Rights Restoration Act (FERRA), designed to undo the Court's "distorted" reading in *Beach* of the constitutional doctrine of equal protection. FERRA would begin by making its own statutory restatement of the equal protection concept, whereby (1) commercial rights to contract and to conduct a lawful business are elevated to suspect classifications, and (2) strict scrutiny is to be applied to any economic law or regulation that substantially burdens those fundamental commercial rights.

Following the RFRA path still further, FERRA could then create a statutory "claim or defense" that a federal or state governmental action violates not the Fifth Amendment, not the Fourteenth Amendment, but the equal protection concepts statutorily embodied and reframed in FERRA. Such a "claim or defense" could be raised in any federal or state court proceeding. And to complete its congruence with RFRA, FERRA would declare that it applies "to all federal and state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." In this way FERRA would then be like RFRA, constituting a silent amendment to every law and provision in the United States Code, every state law and regulation, and every city ordinance that affects business interests.

The FERRA example can be multiplied in many areas of the law. If RFRA is constitutional, there would appear to be few if any limits to Congress' ability to direct an interpretation of a provision of the Constitution to which the Supreme Court has given a more limiting interpretation, at least in the areas of individual rights embodied in the First and Fourteenth Amendments by purporting to create a statutory right of action.

Thus one can imagine other RFRA-like statutes that would (1) ratchet obscenity and pornography up to the status of free speech, which the Court has refused to do,[218] (2) ratchet up the personal interest in reputation to the level of a constitutionally protected liberty interest,[219] (3) ratchet up the right to an education to the status of a constitutionally protected right,

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Court, "may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102. The Court also made clear that this rational basis kind of review was applicable both to the Fourteenth Amendment's Equal Protection Clause and to the equal protection component of the Fifth Amendment. *Id.* at 2101.

[218] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

[219] *Cf.* Paul v. Davis, 424 U.S. 693 (1976).

subject to strict scrutiny,[220] (4) ratchet up gender and sexual orientation to the highest levels of scrutiny,[221] (5) define and ratchet up additional unenumerated privacy rights as yet unrecognized by the Court, or (6) restore and ratchet up those privileges and immunities of citizens of the United States that were destroyed by the *Slaughterhouse Cases*.[222] In short, the RFRA model can be used by Congress to reform, destroy or restore a wide variety of the Court's constitutional interpretations, thus putting Congress into the heart of the judicial function.[223]

VII. RFRA AND THE SEPARATION OF POWERS

The foregoing account of RFRA's provisions illuminates the constitutional defect of the statute.[224] On its face and by its proclaimed purpose, RFRA

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[220] *Cf.* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[221] *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Frontiero v. Richardson, 411 U.S. 677 (1973).

[222] 83 U.S. (16 Wall.) 36 (1873).

[223] Congress has already attempted to do what it did in RFRA in the area of abortion rights. The proposed Freedom of Choice Act was intended to limit the states' ability to restrict abortions as provided under the strict scrutiny test of Roe v. Wade. *See* Lupu, *Statutes Revolving,, supra* note 116.

[224] Many courts have raised (without deciding) the issue of whether or not RFRA is constitutional: Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) ("Whether RFRA is constitutional has not yet been decided, and that question is not before this court."); Cheffer v. Reno, 55 F.3d 1517, 1522 n.11 (11th Cir. 1995) ("Questions have been raised about the constitutionality of the RFRA. . . . These questions are muddled considerably in this case . . . . It may be, under these circumstances [a RFRA challenge to another federal statute passed by the same Congress], that the RFRA can be viewed as simply having the effect of a contemporaneously enacted rule of construction."); Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) ("The constitutionality of this legislation—surely not before us—raises a number of questions involving the extent of Congress' powers under section 5 of the Fourteenth Amendment."); Loden v. Peters, 1995 WL 89951 *9 (N.D. Ill. Mar. 1, 1995) (noting *Canedy* decision); Muslim v. Frame, 891 F. Supp. 226, 228 n.2 (E.D. Pa. 1995) (noting issue not raised but describing Congress' Section 5 authority); Rust v. Clarke, 883 F. Supp. 1293, 1304 n.12 (D. Neb. 1995) (noting issue not raised); Hsu v. Roslyn Union Free Sch. Dist., 876 F. Supp. 445, 461 n.20 (E.D.N.Y. 1995) (noting issue not raised); Newman v. Midway Southern Baptist Church, 1995 Bankr. LEXIS 836 (U.S. Bankr. Ct. D. Kan. April 20, 1995); Germantown Seventh Day Adventist Church v. City of Philadelphia, 1994 U.S. Dist. LEXIS 12163, at *6 n.1 (E.D. Pa. Aug. 26, 1994) (noting issue not raised); Allah v. Beyer, 1994 U.S. Dist. LEXIS 14340, at *16 n.1 (D.N.J. March 29, 1994) ("[T]he constitutionality of Congress' attempt to dictate to the Supreme Court that it must reject its current interpretation of the First

violates the separation of powers doctrine, the most fundamental element of our constitutional system of checks and balances.[225] Congress has stepped over the

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Amendment's Free Exercise Clause in favor of a prior interpretation is questionable . . . ."); Lawson v. Dugger, 844 F. Supp. 1538, 1542 (S.D. Fla. 1994) (noting issue not raised); Van Osdol v. Vogt, 1996 Colo. LEXIS 8, *21 n.12 (Colo. Jan 16, 1996) ("The constitutionality of RFRA is being tested in the federal courts, but has not yet been addressed by the United States Supreme Court."); Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W.2d 195, 201 (Mich. Ct. App. 1995) (concurring opinion of Judge Murphy questioning Congress' authority "to legislate the standard of judicial review applicable to a free exercise of religion claim."); Hunt v. Hunt, 648 A.2d 843, 850 n.4 (Vt. 1994) ("[T]hough a federal law guides our analysis, because the Act defines the meaning of the federal constitution, our resolution of this case rests on a constitutional as well as statutory basis. We express no opinion as the constitutionality of the Act.").

In other cases, the issue of RFRA's constitutionality was raised but not reached by the court: Cochran v. Morris, 1996 WL 29324 at *10 (4th Cir. Jan. 26, 1996); Hamilton v. Schriro, 1996 WL 11119 at *4 (8th Cir. Jan. 12, 1996); Bass v. Grottoli, 1995 WL 565979 at *7 n.3 (S.D.N.Y. Sept. 25, 1995); Muhammed v. City of New York, 904 F. Supp. 161 (S.D.N.Y. 1995); Snyder v. Murray City Corp., 902 F. Supp. 1444, 1450 n.12 (D. Utah 1995); Reimann v. Murphy, 897 F. Supp. 398, 403 (E.D. Wis. 1995); Van Dyke v. Washington, 896 F. Supp. 183, 189 (C.D. Ill. 1995); George v. Sullivan, 896 F. Supp. 895 (W.D. Wis. 1995); Thiry v. Carlson, 1995 U.S. Dist. LEXIS 8030 (D. Kan. May 5, 1995); Abdul-Akbar v. Department of Corrections, 1995 WL 757937 at *19 (D. Del. Dec. 19, 1995) (assuming, without deciding, constitutionality); United States v. Meyers, 906 F. Supp. 1494, 1498 (D. Wyo. 1995) (assuming, without deciding, constitutionality); Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994).

A RFRA constitutionality challenge was withdrawn in several cases: Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995); Francis v. Keane, 888 F. Supp. 568, 571 n.2 (S.D.N.Y. 1995).

[225] One federal circuit court of appeals and several federal district courts have upheld RFRA as being an appropriate exercise by Congress of its Section 5 power to enforce the provisions of the Fourteenth Amendment. Flores v. City of Boerne, 1996 WL 23205 (5th Cir. Jan. 23, 1996); Belgard v. Hawaii, 883 F. Supp. 510 (D. Haw. 1995); Sasnett v. Department of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995); *see also* Abordo v. Hawaii, 902 F. Supp. 1220 (D. Haw. 1995); State v. Miller, 1995 Wis. App. LEXIS 945 (Wis. Ct. App. 1995) (agreeing with analysis in *Belgard* and *Sasnett*); *see also* United States v. Bauer, 1996 WL 42240 at *7–*8 (9th Cir.) (no discussion of constitutionality but comparison of RFRA to other statutes that validly give protection beyond constitutional minimums).

A separation of powers violation has been discussed in several decisions. *In re* Tessier, 190 B.R. 396, 407 (D. Mont. 1995) ("RFRA violates the separation of powers doctrine by setting for the courts a balancing test the Supreme Court has designated judicially unworkable. The task of defining tests to adjudicate First

constitutional line that separates, in Justice Harlan's words, "what questions are appropriate for congressional determination and what questions are essentially judicial in nature."[226] In short, Congress has interfered with the "province and duty" of the judiciary "to say what the law is" in free exercise cases and controversies.[227]

A. *The Violation of the Cooley Principle of Separation*

RFRA, masked as a statutory claim or defense, attempts to "restore" to the judicial system three things: (1) the pre-*Smith* judicial reading of the Free Exercise Clause, making it applicable to neutral and generally applicable laws; (2) the pre-*Smith* judicial use of the compelling governmental interest test in adjudicating free exercise claims; and (3) a judicial recognition and restoration of the religious exercise rights that follow from use of that pre-*Smith* judicial test. And in the course of this restoration process, RFRA seeks to induce all courts, federal and state, to ignore, if not overrule, the *Smith* ruling. Thus, RFRA is a congressional arrow aimed directly at the heart of the independent judicial function of constitutional interpretation.

To paraphrase what the constitutional scholar Thomas Cooley observed long ago, a legislative body like Congress cannot, without breaching the line separating the legislative and judicial functions,

> compel the courts for the future to adopt a particular construction of a law [the Free Exercise Clause], which . . . remain[s] in force . . . [and] cannot thus indirectly control the action of the courts, by requiring of them a construction of the [Free Exercise Clause] according to its own views . . . or directing what

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Amendment rights fall properly with the Judicial Branch."); Hamilton v. Schriro, 1996 WL 11119, at *20 (8th Cir. Jan. 12, 1996) (McMillian, J., dissenting) ("In essence, Congress has instructed the Supreme Court how to interpret the Free Exercise Clause. . . . It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of separation of powers."); State v. Miller, 1995 Wis. App. LEXIS 945, at *16-17 (Wis. Ct. App. Dec. 7, 1995) (Sundby, J., dissenting) ("I do not accept that Congress may compel the United States Supreme Court to interpret the Free Exercise Clause of the First Amendment as Congress believes it should be interpreted.")

[226] Katzenbach v. Morgan, 384 U.S. 641, 666 (1966) (Harlan, J., dissenting).

[227] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). This separation principle has recently been reaffirmed in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453 (1995).

particular steps shall be taken in the progress of a judicial inquiry.[228]

Yet, that is precisely what RFRA seeks to do. It aims to "compel the courts for the future to adopt a particular construction"[229] of the Free Exercise Clause, by forcing the courts to adopt the particular and expanded construction of the Clause that appears in Section 1(a) and (b) of RFRA.[230] It tries to "indirectly control the action of the courts, by requiring of them a construction" of the Free Exercise Clause as restated in Section 1(a) and (b) to reflect Congress' "own views" as to how the Clause should be construed.[231] And RFRA, by prescribing use of the compelling governmental interest test whenever a RFRA claim or defense is made, certainly directs "what particular steps shall be taken in the progress of a judicial inquiry" into a free exercise claim.[232] Indeed, courts must employ the constitutional doctrine of balancing in all free exercise cases brought under RFRA.

RFRA thus violates every precept of Thomas Cooley's observation, which may appropriately be designated the Cooley Principle of Separation. It is a principle that applies to both direct and indirect incursions by Congress into the independent kingdom of the judiciary. And it is a principle that condemns any such incursion masquerading as the functional equivalent of a separate statutory right of action.

The Cooley Principle of Separation is fully consistent with, and indeed is a part of, the Court's modern revival of Madison's pragmatic and flexible approach to separation of powers.[233] In Madison's view, the separation

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[228] THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 94–95 (1868). These remarks by Judge Cooley were recently quoted by the Supreme Court in Plaut, 115 S. Ct. at 1456. The Court there described Cooley as "the great constitutional scholar." Cooley's "eminence as a legal authority" has also been said to rival "that of Story." Wallace v. Jaffree, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting).

[229] *See supra* note 228 and accompanying text.

[230] 42 U.S.C. § 2000bb-1(a)–(b) (Supp. V 1993).

[231] *See supra* note 228 and accompanying text.

[232] *Id.*

[233] Mistretta v. United States, 488 U.S. 361, 381 (1989). Madison's pragmatic and flexible approach is set forth in THE FEDERALIST No. 47, at 324–26 (James Madison) (J. Cooke ed. 1961). He there wrote that while the Constitution divides the Government into three co-equal branches, the separation doctrine does not mean that "these departments ought to have no *partial agency* in, or no *control* over the acts of each other." The separation doctrine, in other words, allows a certain amount of blending of the three functions, but does not permit the *whole* power of one department [to be] exercised by the same hands which possess the *whole* power of another department." *Id.*; *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977); Morrison v. Olson, 487 U.S. 654, 693–94 (1988); Buckley v. Valeo, 424 U.S. 1, 121–22 (1976).

doctrine allows a practical amount of blending of the three governmental powers. But the doctrine is violated when one branch seeks to exercise the whole or core powers of another branch. The Cooley Principle is thus but an elaboration of how the legislative branch violates the separation principle when, as in RFRA, it seizes the whole or core function of the judiciary in reading, interpreting and applying the Free Exercise Clause in the context of cases and controversies.[234]

As if to emphasize the indirectness that marks its control of the judicial process, RFRA makes every effort to distance itself from a direct confrontation with the *Smith* reading of the Free Exercise Clause. As we have mentioned,[235] RFRA repeatedly is described as creating a new statutory prohibition on governmental action, bearing its own standard of review, and "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision."[236] As expressed by two of the leading proponents of RFRA:

> The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted. As a replacement for the Free Exercise Clause, the Act had to be as universal as the Free Exercise Clause. It had to protect all religions equally against all assertions of regulatory interests. The only way to draft such a protection was in the manner of the Free Exercise Clause itself—as a general principle of universal application.[237]

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[234] Justice Powell once wrote that the pragmatic separation doctrine can be violated in either of two ways: (1) one branch "may interfere impermissibly with the other's performance of its constitutionally assigned function," or (2) one branch may assume "a function that more properly is entrusted to another." INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring). RFRA appears to involve both kinds of violations.

[235] *See supra* part VI.D.

[236] SENATE REPORT, *supra* note 4, at 14 n.43.

[237] Laycock & Thomas, *supra* note 5, at 219. In a similar vein, Justice Thomas has described RFRA as follows: "as a substitute for constitutional protection, RFRA grants a *statutory* 'claim or defense to persons whose religious exercise is substantially burdened by government.'" Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460, 460 n.1 (1994) (Thomas, J., dissenting from denial of certiorari) (emphasis added) (citation omitted).

Professor Laycock has also observed:

> What may make RFRA seem anomalous at first blush is that it appears to attempt to overrule the Supreme Court's decision in *Smith*. But RFRA would not overrule the

That is an accurate but provocative statement. It is a statement confirmed by the very language of RFRA. This statute is truly designed, we are told, "to perform a constitutional function," thus making it a "quasi-constitutional statute." We are told that RFRA is "designed to restore the [free exercise] rights that previously existed," not under a previous statute but under the Free Exercise Clause itself. And these rights, as encompassed in RFRA, are said to be those that "Congress believes should exist if the Constitution were properly interpreted." We are thus being told that Congress, by enacting RFRA, believes that it can better and more properly interpret the Constitution than the Supreme Court. And Congress mandates this better interpretation by requiring the use of a judicial standard of review that has no independent statutory source. Here is a most egregious violation of the Cooley Principle of Separation.

By its restorative efforts, RFRA seeks to accomplish indirectly what it concededly cannot do directly. Even its most ardent supporters acknowledge that "Congress simply lacks the constitutional authority to override the Court's interpretation of the First Amendment."[238] Or, as Congressman Henry J. Hyde puts it, "the label 'restoration' in this [RFRA] context is inappropriate. Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment."[239] And as the Cooley Principle of Separation teaches, the legislature cannot "compel the courts to adopt a particular construction of a law" and thereby "indirectly control the action of the courts."

The result is the statutory transfer of the judicial power of constitutional interpretation from the Supreme Court to the Congress. Congress, not the Supreme Court, thus becomes the ultimate judicial interpreter and enforcer of the Free Exercise Clause.

Attempts to find constitutional authority for such a breach of the separation of powers doctrine are non-productive. The legislative history of RFRA shows

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> Court; rather, it would create a statutory right where the Court declined to create a constitutional right. This distinction is not a mere formality; it has real consequences . . . .

Laycock, *supra* note 116, at 246.

But in light of repeated statements by RFRA's sponsors that the real purpose is to overrule *Smith* by restoring the governmental interest test, the "first blush" refuses to go away.

[238] Laycock & Thomas, *supra* note 5, at 243.

[239] Additional views of Congressman Henry J. Hyde and others are attached to HOUSE REPORT, *supra* note 4, at 15 n.3.

only a sparse search for such authority. But from brief remarks in the committee reports and from the writings of RFRA's proponents, we find that RFRA purports to rest its congressional authority on two constitutional provisions: (1) Section 5 of the Fourteenth Amendment, sometimes known as a "little necessary and proper clause," and (2) the original Necessary and Proper Clause, Article I, Section 8, Clause 18. Thus, it is the belief of the House Judiciary Committee that, by virtue of these two clauses, "the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority."[240] But neither of those constitutional provisions provides any real validating aid or comfort for RFRA. And so they do demand our attention and analysis.

B. *Section 5 of the Fourteenth Amendment*

Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." For RFRA purposes, there are several structural features of Section 5 to be stressed. First is the obvious fact that, since the Fourteenth Amendment applies only to state action, Section 5 empowers Congress to legislate solely to enforce the obligation of the States to respect the individual rights encompassed by the Amendment. Section 5 simply does not empower Congress to legislate respecting any form of federal action.[241] Only the Necessary and Proper Clause of Article I gives Congress such power.

In addition, neither Section 5 of the Fourteenth Amendment nor the Article I Necessary and Proper Clause represent anything more than an affirmative grant to Congress of the power to enact necessary and proper legislation to enforce or execute some other substantive provision of the Constitution. Whatever statute is enacted pursuant to such power must be related to and find its ultimate legitimacy in that other provision of the Constitution, be it a substantive provision of the Fourteenth Amendment or an Article I provision such as the Interstate Commerce Clause. It is not enough, when assessing the constitutionality of RFRA, simply to refer to or rely upon Section 5 of the

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[240] HOUSE REPORT, *supra* note 4, at 9.

[241] Unlike the Fourteenth Amendment provisions, the substantive provisions of the Fifteenth Amendment, which protect the voting rights of citizens against denial or abridgment on account of race or color, apply to both the United States or any State. Thus, under the Section 2 enforcing provision of the Fifteenth Amendment (which is the counterpart of Section 5 of the Fourteenth Amendment), Congress can enact enforcing legislation respecting both federal and state action. *See* Hamilton, *supra* note 126, at 376–77.

Fourteenth Amendment. More analysis than that is necessary.

Third is the fact that the Free Exercise Clause, being a part of the First Amendment, becomes a substantive part of the Fourteenth Amendment only by way of judicial incorporation of the First Amendment into the "liberty" concept of the Due Process Clause. The First Amendment, which contains no independent enforcing power, is a part of the Fourteenth Amendment by sufferance of the Supreme Court's selective incorporation doctrine. It is at this point that RFRA meets its first Section 5 problem. Does the Section 5 power of Congress to enforce the "provisions" of the Fourteenth Amendment extend to enforcing "provisions" that are in the Fourteenth Amendment only by reason of subsequent judicial incorporation? Or is the power limited to enforcing the Amendment's original "provisions" and purposes, which "were designed primarily to address the problem of slavery and racial discrimination"?[242] And since incorporation is solely the product of the judicial process, should not the scope and interpretation of an incorporated provision be solely the province of the judiciary? To those questions there are no definitive answers.[243]

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[242] Conkle, *supra* note 15, at 68. Professor Conkle adds that since RFRA addresses only an incorporated right rather than slavery or racial discrimination, "the core historical meaning of the Civil War Amendments is not implicated, and there is less reason for the Court to defer to congressional decisionmaking." *Id.* at 69; *see also* Idleman, *supra* note 116, at 304–07.

[243] In Hutto v. Finney, 437 U.S. 678 (1978), the Court implicitly assumed that Congress has Section 5 power to incorporate the Eighth Amendment into the Fourteenth Amendment. But Congress was found to have used that power in a remedial fashion, so as to authorize the award of attorneys' fees in civil rights actions brought against states to enforce the Eighth Amendment right to freedom from cruel and unusual punishments. Congress did not there seek to ratchet up any right to protection against forms of cruel and unusual punishment that had not been recognized by the Court. Nor did Congress mandate that courts utilize a particular standard of review in assessing cruel and unusual punishment claims. Hamilton, *supra* note 126, at 391 n.127.

No other Supreme Court opinion, not even the seminal Katzenbach v. Morgan, 384 U.S. 641 (1966), has expressly addressed or resolved these questions. The few individual Justices who have spoken have reached opposite conclusions. Then Justice Rehnquist, for example, has written that "it is not at all clear to me that . . . Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters." *Hutto*, 437 U.S. at 717–18 (Rehnquist, J., dissenting). On the other hand, Justice Black implied that Congress can enforce incorporated rights by stating that Section 5 does not empower Congress "to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States." Oregon v. Mitchell, 400 U.S. 112, 129 (1970) (individual opinion of Black, J.); *see* Idleman, *supra* note 116, at 302–22.

But even if we assume that Congress does have power to enforce an incorporated provision like the Free Exercise Clause, RFRA immediately confronts another constitutional problem. As we have seen, RFRA is certainly not designed to enforce the *Smith* interpretation of the Free Exercise Clause or to enforce the rights protected by that interpretation. Nor is RFRA designed to create substantive rights of free exercise in order to enforce the current interpretation of the Free Exercise Clause. Rather, RFRA seeks to restore, or to induce the courts to restore, a rejected judicial interpretation of the Clause and a rejected judicial balancing test.[244] RFRA makes no pretense of being other than an indirect and not very subtle attempt by Congress to modify the judicially determined meaning of the Free Exercise Clause.

RFRA thus brings into sharp focus the obvious question whether Section 5 grants Congress the substantive power of restoring a judicially abandoned mode of constitutional interpretation.[245] That question is made even sharper by the fact that the Free Exercise Clause is not an affirmative laundry list of individual free exercise rights. Rather, it is a negative proposition, a limitation on governmental power.[246] What individual rights are cognizable or protectable under the Clause are largely the result of how one reads the Clause's restrictions on governmental power. *Smith*'s narrow and absolutist reading produces far fewer individual rights than a broad balancing approach. RFRA, in attempting to restore a pre-*Smith* judicial interpretation of the Free Exercise Clause, can only hope that the courts will restore those free exercise rights that might be recognized were the courts to balance religious exercise burdens as against some governmental interest in enforcing a neutral, generally applicable law.

Suffice it to say that there is no basis or authority whatever for ascribing to Section 5 a congressional empowerment to restore and enforce either (1) a judicially abandoned mode of interpreting an incorporated provision of the Fourteenth Amendment, or (2) the substantive free exercise rights that flow from judicial use of that abandoned mode. Indeed, there is substantial historical evidence that Section 5 was never meant to allow Congress to define or revise the substantive contents of the due process and equal protection guarantees of Section 1 of the Amendment. Apparently the Amendment's framers meant to

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[244] *See supra* part VI.C.

[245] *See* Conkle, *supra* note 15, at 46–55. ("Such a fundamental change in the judicially determined meaning of the Constitution, however, especially with its implications for states' rights, could not be accomplished by congressional legislation. It would require a constitutional amendment.") *Id.* at 55.

[246] *See* Idleman, *supra* note 116, at 317 (referring to "the prevailing philosophical-doctrinal understanding of the Bill of Rights as an exposition of negative, as opposed to positive, rights").

give Section 5 a remedial purpose only, the purpose being to "enforce" the substantive provisions by outlawing or providing a remedy for state laws that Congress deemed to be in violation of the substantive provisions.[247] But the substantive provisions themselves were meant to be defined only by their own terms or as read by the primary arbiter, the Supreme Court.[248]

None of the drafters or proponents of RFRA state a convincing case for the existence of a congressional revisory power respecting the substance of Section 1 of the Fourteenth Amendment. Their major argument is that Section 5 gives Congress broad powers and that the Supreme Court "has repeatedly held that Congress may use this [Section 5] power to define and protect rights that are more expansive than what the Court has held to be constitutionally

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[247] A noted authority on the history of the Fourteenth Amendment concluded:

> [n]othing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. Rather the framers chose to write an amendment empowering Congress only to rectify inequalities put into effect by the states. Hence the power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met.

Alexander Bickel, *The Voting Rights Cases*, *in* 1966 SUP. CT. REV. 75, 97 (Philip B. Kurland ed., 1966). For another historical view of Section 5, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995).

The statements of some of the sponsors and crafters of the Fourteenth Amendment support the remedial reading of Section 5. Thus, Representative Thaddeus Stevens stated that Section 5 "allows Congress to correct the unjust legislation of the States." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Senator Jacob Howard of Michigan similarly argued that Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.* at 2768.

[248] *Cf.* Sasnett v. Department of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995), where the court, in upholding the constitutionality of RFRA, stated:

> Even if Congress does lack the power to interpret the Constitution under § 5, the Religious Freedom Restoration Act is best justified as an exercise of Congress' remedial powers under § 5. Under this view of the legislation, Congress has not attempted to define the First Amendment; rather, it has merely prohibited otherwise lawful activity as a means of further enforcing constitutional rights.

Id. at 1318.

protected."[249] But that argument fails to address the nature of RFRA. Congress is not here "defining" or "protecting" rights "more expansive" than those the Court found protectable in *Smith*. Rather, Congress seeks to compel courts to restore usage of the pre-*Smith* compelling governmental interest test. It is no more than a hope or expectation that a congressionally inspired judicial revival of that constitutional doctrine will produce a "more expansive" list of protected free exercise rights.

Nor has the Supreme Court "repeatedly held" that Congress may, in this fashion, expand the list of protected free exercise rights. The leading case dealing with the scope of Section 5, the 30-year-old Supreme Court decision in *Katzenbach v. Morgan*,[250] sheds no light or encouragement on the RFRA technique of piling one restoration upon another, i.e., restoring substantive rights by restoring a judicial mode of constitutional interpretation. *Morgan* in no way involves, recognizes, discusses, or approves any such restorative power under Section 5. Moreover, it is a decision concerned solely with congressional enforcement of the Equal Protection Clause, an original and nonincorporated provision of the Fourteenth Amendment.[251]

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[249] Ackerman, *supra* note 148, at 30.

SENATE REPORT, *supra* note 4, at 14 n.41, cites Katzenbach v. Morgan, 384 U.S. 641, 650 (1966), for the proposition that "Section 5 gives Congress 'the same broad powers expressed in the [Art. I] necessary and proper clause' with respect to State governments and their subdivisions."

HOUSE REPORT, *supra* note 4, at 5 asserts that Section 5 gives Congress the authority "to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority." It further asserts that the Supreme Court "has repeatedly upheld such congressional action after declining to find a constitutional protection itself." *Id.* Appended to the latter statement is footnote 21, citing South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Thornburg v. Gingles, 478 U.S. 30 (1986). All but one of these citations, plus Katzenbach v. Morgan, are cited in the Ackerman report, *supra* note 148, at 30 n.129.

[250] 384 U.S. 641 (1966).

[251] In *Morgan*, Justice Brennan wrote that, "[c]orrectly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and that the sole issue in *Morgan* was whether Section 4(e) of the Voting Rights Act of 1965 was appropriate legislation "to enforce the Equal Protection Clause." 384 U.S. at 651.

Justice Stevens has recently read *Morgan* as viewing Section 5 "as a positive grant of authority in Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. . . . Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2126 n.11 (1995) (Stevens, J., dissenting). But see the reference

The rather cloudy *Morgan* decision states in a footnote that "Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment" but does not grant Congress the authority "to restrict, abrogate, or dilute these guarantees."[252] From that footnote, commentators have developed a so-called "ratchet theory," which turns around the negative statement that Congress cannot "restrict, abrogate, or dilute" into an implied affirmation of power to "add to or extend" the substantive Fourteenth Amendment rights as recognized by the Supreme Court.[253] Thus, like any ratchet, this Section 5 ratchet power is said to go in one direction only, upward not downward.[254] But even if we accept that Congress can, by adopting a "ratcheting upward" statute, expand an incorporated Fourteenth Amendment right beyond what the Supreme Court has recognized, RFRA is simply not such a statute. It bears repetition that RFRA does not aim to restore any substantive right of free exercise that is unduly burdened by a generally applicable law. Rather, RFRA concentrates on mandating the courts, in the exercise of their judicial case or controversy tasks, to do two things: (1) to interpret the Free Exercise Clause to encompass generally applicable laws, and (2) to balance such laws against any resulting

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in Justice O'Connor's majority opinion in *Adarand* to the "different views" of the Justices as to the authority Section 5 "confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority." *Id.* at 2114.

252 *Morgan*, 384 U.S. at 651 n.10; *see generally* GERALD GUNTHER, CONSTITUTIONAL LAW 983-93 (12th ed. 1991).

253 *See* Laycock, *supra* note 206. Professor Laycock argues that "a substantive understanding of the ratchet theory is squarely based in the historical context of the Fourteenth Amendment and separation of powers." *Id.* at 155. He also states that this theory rests on an understanding that the Supreme Court "does not have exclusive power to protect our liberties or define their scope" and that "[i]n the absence of a court order or opinion constraining the behavior of the other branches, they can act on their own view of liberty or of the Constitution, and it matters little whether we think of such action as constitutional interpretation or as something else." *Id.* at 154.

254 This *Morgan* footnote discussion, which is the origin of the "ratchet theory," was inserted into the majority opinion by Justice Brennan in response to Justice Harlan's dissent. Justice Harlan, joined by Justice Stewart, complained that since the Court seemed to read Section 5 "as giving Congress the power to define the *substantive* scope of the Amendment," why should not Congress "be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

Professor Laurence Tribe has observed that Justice Brennan's "ratchet theory," as expressed in Footnote 10, "did not fully explain, however, *why* congressional power was so limited; nor did it attempt to reconcile with the principle of judicial review even a one-way power authoritatively to construe the Constitution." TRIBE, *supra* note 137, at 343.

substantial burdens on religious exercises. To state those RFRA propositions is to reveal the plain violation of the Cooley Principle of Separation.

Certainly the Constitution is not known for silently distributing governmental powers by metaphors or ratchets. Neither the *Morgan* footnote nor the "ratchet theory" says or explains anything about congressional power to "restore" guarantees that the Supreme Court, by the interpretive process, has written out of the constitutional scope of the Fourteenth Amendment. Nor does the "ratchet theory" or *Morgan* itself imply that Congress may disregard Supreme Court precedent in the name of increasing Fourteenth Amendment rights. Moreover, as we have seen, the "remedial theory" underlying Section 5[255] may well outweigh or conflict with the "ratchet theory" to the extent that the latter is used by Congress to extend the substantive provisions of the Amendment.[256]

The "ratchet theory," which at the time of its birth in *Morgan* led to a spirited dissent by Justices Harlan and Stewart, has never been revisited, followed, or clarified by the Court. Indeed, the Court on a few occasions has carefully avoided the issue, while individual Justices have used strong language in rejecting the existence of such substantive Section 5 power.[257] And the

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[255] After exploring RFRA in light of both the "remedial theory" and the "substantive theory" that are said to underlie the *Morgan* interpretation of Section 5, Judge McMillian of the Eighth Circuit has concluded that RFRA does not satisfy either theory. Hamilton v. Schriro, 1996 WL 11119, at *22 (8th Cir. Jan. 12, 1995) (McMillian, J., dissenting from a majority opinion that did not reach or discuss RFRA's constitutionality). Judge McMillian's ultimate conclusion is that Section 5 does not serve to validate RFRA on either theory. In his words, "RFRA's imposition of the compelling interest test on all free exercise claims is nothing less than a radical alteration of the Supreme Court's free exercise jurisprudence" and the Court's "understanding of what the Free Exercise Clause actually means," thereby presenting "an obvious and serious threat to the delicate balance of the separation of powers." *Id.* at *68–*75; *see also* Conkle, *supra* note 15, at 47.

[256] Justice Harlan's dissent in *Morgan* asserted that the majority opinion "in effect" reads Section 5 "as giving Congress the power to define the *substantive* scope of the [Fourteenth] Amendment." *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting). But nowhere does the majority acknowledge that reading.

[257] Thus, in Pennhurst State Sch. v. Halderman, 451 U.S. 1, 16 n.12 (1981), the Court found it unnecessary to decide whether Section 5 gives Congress power to create substantive rights beyond those declared by the Court. The Court again avoided the issue in EEOC v. Wyoming, 460 U.S. 226 (1983), but four dissenting Justices discussed and roundly rejected the "ratchet theory" of congressional power in these terms: "Allowing Congress to protect constitutional rights statutorily that it has independently defined [i.e., "independently of our case law"] fundamentally alters our scheme of government." *Id.* at 262 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting). The four

ensuing academic debates have generally warned that the *Morgan* "ratchet theory" of substantive Section 5 power "must be regarded as suspect" and filled with "judicial skepticism."[258]

The most that can be said of *Morgan* is that it recognizes the unremarkable proposition that Congress has remedial power under Section 5 to enforce and effectuate a judicially determined constitutional prohibition on racial discrimination.[259] That holding, however, gives no support to RFRA, which expressly abjures any remedial enforcement of the *Smith* reading of the Free Exercise Clause. Nor, to repeat, does *Morgan* even pretend to hold that Congress can enact a statute like RFRA, that it can directly repudiate the substance of the Supreme Court's interpretation of a constitutional provision, or that it can substitute its own version of such a provision and thereby effectively amend the Constitution. But *Morgan* is relevant to RFRA in one critical

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dissenters also distinguished Oregon v. Mitchell, 400 U.S. 112 (1970), as having finally imposed "a limitation on the extent to which Congress may substitute its judgment for that of the states and assume this Court's 'role of final arbiter.'" *Id.*

[258] Conkle, *supra* note 15, at 52; *see also* Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Idleman, *supra* note 116; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

Professor Cox, in the last cited article, makes a trenchant observation that

> [n]othing in *Morgan* suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the document [the Constitution] and other sources of law; the opinion seemed to require Congress to *apply the same standard* as the Court, merely leaving it free to apply the standard differently where the application turned upon "questions of fact."

Cox, *supra*, at 234.

[259] *Morgan*, 384 U.S. at 652–56. The Court, in this critical portion of its opinion, gives great deference to the enactment of § 4(e) of the Voting Rights Act, designed by Congress "'to secure the [voting] rights under the [equal protection component of the] fourteenth amendment of persons educated in American-flag schools in which the predominate classroom language was other than English.'" *Id.* at 652 (citation omitted). The effect of the decision was to nullify a New York voting requirement of English literacy. In so holding, the Court distinguished its prior holding in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), which sustained a North Carolina English literacy requirement "as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments." *Morgan*, 384 U.S. at 649. *Lassiter* was said not to present the issue involved in *Morgan*, i.e., "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?" *Id.*

respect. The Court there holds that, in assessing the validity of congressional action taken under Section 5, the Court applies the same standard used in evaluating actions taken under the original Necessary and Proper Clause in Article I, Section 8.[260] That standard is the historic three-part test formulated in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[261]

Application of the *McCulloch* test to RFRA quickly demonstrates that Congress acted far beyond its constitutional authority. No statute that so openly and so completely invades the Article III judicial processes and the supremacy of the Supreme Court's role in constitutional interpretation can possibly survive this test. To wit:

(1) The first requirement of the *McCulloch* test is that the statute's "end be legitimate." But it is impossible to find legitimacy in RFRA's overweening "end" or "purpose," openly proclaimed in Section 2(b)(2), "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened." Add the repeated statements of RFRA's framers and sponsors that the real purpose of the Act is to overturn the Supreme Court's decisions in *Smith* and *O'Lone*,[262] and we are forced to conclude that Congress simply cannot act with such "ends" in mind. It is the height of illegitimacy for Congress to seek to control the judicial standards used in treating free exercise cases and controversies, to mandate or correct a judicial interpretation of the Free Exercise Clause, or to induce the judiciary to ignore if not overrule Supreme Court decisions.[263] There is no provision in the

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[260] *Morgan*, 384 U.S. at 651.

[261] 17 U.S. (4 Wheat.) 316, 321 (1819). Twelve years after the adoption of the Fourteenth Amendment, in Ex parte Virginia, 100 U.S. 339, 345–46 (1880), the Court described the scope of congressional power under Section 5 in a manner strikingly similar to the *McCulloch* formulation:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id.

[262] *See supra* note 4.

[263] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872), where the Court voided a statute enacted by Congress in exercise of its enumerated Article III power to make exceptions to the Court's appellate jurisdiction, because its "great and controlling purpose"

Constitution that empowers Congress to legislate such "ends."[264]

(2) The second prong of the *McCulloch* test is that Congress may, in its discretion, adopt any or "all means which are appropriate, which are plainly adapted to that [legitimate] end." This "appropriate means" standard is replicated in Section 5 of the Fourteenth Amendment, which states that Congress shall have power to enforce the Amendment "by appropriate legislation." But if RFRA's end be illegitimate, no statute seeking to achieve that illegitimacy can be considered "appropriate" or "plainly adapted."[265]

(3) The last prong of the *McCulloch* test requires that the congressional statute be consistent with all other provisions of the Constitution. RFRA fails this critical part of the test. RFRA's collision with the separation of powers doctrine, as explicated in the Cooley Principle of Separation, is both obvious and substantial. And the collision is unprecedented.

Congress has rarely tried to cross the border that separates the congressional and judicial branches of the Federal Government. Each attempt has been rebuffed. For more than 200 years, beginning with the 1792 statements of five Supreme Court Justices in *Hayburn's Case*,[266] highlighted by

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or end was illegitimate in that the statute was a deliberate "means to an end . . . to deny to pardons granted by the President the effect which this court has adjudged them to have." Thus, the statute was an unconstitutional invasion of the executive power to grant pardons.

[264] In Flores v. City of Boerne, 1996 WL 23205 (5th Cir. Jan. 23, 1996), the Fifth Circuit held that RFRA satisfies the first prong of the *McCulloch* test inasmuch as RFRA seeks the legitimate end of restoring the pre-*Smith* compelling interest test in order to "enforce the right guaranteed by the free exercise clause of the first amendment." But that statement begs the critical question whether it is a legitimate end for Congress to dictate to the courts the judicial standard for judicial enforcement of the right guaranteed by the Free Exercise Clause.

[265] *See Klein*, 80 U.S. at 146, where the Court refused to follow the so-called statutory means of altering the Court's rules of decision in order to achieve the congressionally declared "end" of impairing the executive pardon power.

In the *Flores* case, the Fifth Circuit held that RFRA is "plainly adapted" to its purported end of enforcing free exercise rights by virtue of the remedial power of Congress under Section 5 of the Fourteenth Amendment "to find and redress nascent or disguised violations of the Amendment." *Flores*, 1996 WL 23205, at *7. Presumably, such violations result from the judicial *Smith*-type refusal to find or redress substantial burdens on religious exercises imposed by neutral and generally applicable laws. But if RFRA's "end" be illegitimate, creating a congressional interference with the judicial case or controversy function of reading and applying the Free Exercise Clause, it is idle to ask whether RFRA is "plainly adapted" to that illegitimate end. Stated differently, RFRA is "plainly adapted" only to the end of forcing the courts to use their judicial powers to revise their reading of the Clause and thus "to find and redress nascent or disguised violations of the Amendment."

[266] 2 U.S. (2 Dall.) 409 (1792). *Hayburn's Case* started in the Supreme Court as

the 1872 opinion in *United States v. Klein*,[267] and eloquently reaffirmed in 1995 by the ruling in *Plaut v. Spendthrift Farm, Inc.*,[268] the Court has consistently and firmly committed itself to respect and follow the Cooley Principle of Separation. That is, the Court will not tolerate any congressional leap over the constitutional line separating the core functions of the legislative and judicial domains.

Thus in *Hayburn's Case*, five of the original Supreme Court Justices, sitting as Circuit judges, ruled that the then-fresh separation of powers doctrine precluded Congress from acting as a court of errors to review judicial acts or opinions.[269] And in *Klein*, the Court first reiterated its pledge to maintain the constitutional intention "that each of the great co-ordinate departments of the government . . . shall be, in its sphere, independent of the others."[270] The Court then found that Congress had "inadvertently passed the limit which separates the legislative from the judicial power" by way of a statute that (1) "prescribe[d] a rule for the decision of a cause in a particular way" and (2) impaired the presidential authority to grant pardons by the indirect method of "direct[ing] the court to be instrumental to that end."[271] Such a statute, the Court held, could not be an appropriate instrument toward such legislative and unconstitutional ends.[272]

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mandamus motions to compel three Circuit Courts to proceed with certain statutory proceedings then pending; but before the Court could act, Congress repealed the offending statute and thus made it unnecessary for the Court to issue mandamus or render an opinion. But the Court's official reports do set forth the reasons given by the three courts below for not pursuing the cases before them. Five of the seven judges in the three courts were Supreme Court Justices sitting as circuit judges. Included were Chief Justice Jay and Justices Cushing, Wilson, Blair, and Iredell. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 391–92 (1980).

[267] 80 U.S. (13 Wall.) 128 (1872).

[268] 115 S. Ct. 1447 (1995).

[269] *Hayburn's Case*, 2 U.S. (2 Dall.) at 410–14. Congress in 1791 had directed the Circuit Courts to rule on the validity of pension claims made by Revolutionary War veterans; the findings of the courts were to be reviewable by the Secretary of War and by the Congress. Three Circuit Courts, in New York, Pennsylvania, and North Carolina, wrote letters to President Washington, asserting that the 1791 Act was unenforceable in the courts inasmuch as any judicial decision was subject to executive and congressional review and revision, thereby violating the separation of powers doctrine and the independence of the judiciary. Many historians regard *Hayburn's Case* as the first instance in which a federal court held an act of Congress unconstitutional. *See* Leonard W. Levy, *Hayburn's Case*, 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 908 (Leonard W. Levy ed., 1986).

[270] *Klein*, 80 U.S. (13 Wall.) at 147.

[271] *Id.* at 146–48.

[272] It has also been suggested that, since the substantial burden, compelling interest, and least restrictive components of RFRA's free exercise test constitute such "vague

Likewise, in *Plaut*, the Court first reviewed the historical and constitutional reasons for establishing the separation of powers doctrine and renewed its pledge to follow the Cooley Principle of Separation, thus ensuring that "the judiciary remains truly distinct from both the legislative and executive."[273] The Court proceeded to void a section of the Securities Exchange Act wherein Congress had sought to interfere with the finality of judgments by retroactively commanding the courts to reopen final judgments in certain cases brought under the Act.[274] Such action by Congress was held to effect "a clear violation of the separation-of-powers principle."[275]

Compared to the situations in *Hayburn's Case*, *Klein* or *Plaut*, RFRA constitutes a more extensive form of legislative incursion into the independent realm of the judiciary, in violation of the Cooley Principle of Separation. This principle, however, appears not to take hold when the congressional act merely amends an applicable substantive law, which inevitably is statutory in nature.[276] But RFRA cannot be said to have effectively amended any applicable substantive law. The only possible substantive law in this instance is the Free Exercise Clause of the First Amendment. And Congress simply cannot amend the Constitution by substituting its own interpretation for that of the Supreme

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terminology and standards," RFRA may not constitute "appropriate legislation" within the meaning of Section 5. Idleman, *supra* note 116, at 311.

[273] Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453–56 (1995). The Court quotes the Cooley Principle, and the Court's reference to keeping the judiciary "truly distinct" from the other two branches is a quotation from THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961).

[274] *Plaut*, 115 S. Ct. 1456–58.

[275] *Id.* at 1456.

[276] Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992); *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431–32 (1856). In the *Flores* opinion, the Fifth Circuit found that RFRA is not in violation of the separation doctrine inasmuch as RFRA simply mandates the courts to create "legislatively mandated religious exemptions" from uniform and generally applicable laws. Flores v. City of Boerne, 1996 WL 23205, at *12 (5th Cir. Jan. 23, 1996). But the Fifth Circuit did not explain how Congress, without violating the separation doctrine, can enter the judicial arena of cases and controversies and compel the courts to adjudicate religious exercise claims in such a way as might result in some unspecified kind of a "religious exemption" from some unspecified kind of a generally applicable law. Indeed, the Fifth Circuit admitted that RFRA speaks in "broad generalities" and that its purpose is to "'turn the [judicial] clock back'" to the day before *Smith* was decided. *Id.* at *10 (citation omitted). But the separation doctrine forbids Congress from entering the judicial clock-setting business or mandating what standard of review the courts must use in adjudicating constitutional claims.

Court. That is what dooms RFRA.[277]

C. *The Article I Necessary and Proper Clause*

In Article I, Section 8, Clause 18, the Constitution empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is upon this Clause, which is the counterpart of Section 5 of the Fourteenth Amendment as applied to state action, that RFRA must rest its case for applying its provisions to federal action.

In the absence of any express power to enforce the provisions of the First Amendment, Congress must rely on the Necessary and Proper Clause to justify application of RFRA to federal departments, agencies and officers charged with executing federal law. And to so apply itself, RFRA calls on us to assume that it effectively, and without any legislative discussion, amends every statute in the United States Code, and that it applies to all federal statutes that may be enacted in the endless future "unless such law explicitly excludes such application by reference to [RFRA]."[278] And all of this is done in the name of the Necessary and Proper Clause.

The constitutionality of RFRA, in the federal sector, is thus supported by this argument: If Congress has the necessary and proper power to enact a bankruptcy or a banking law, then it necessarily has the necessary and proper power to tack onto that law the judicial balancing approach of RFRA. That argument is specious. The Necessary and Proper Clause is not an enumerated

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[277] We do not here address any other inconsistency that RFRA may have with other provisions of the Constitution, such as federalism principles, Establishment Clause principles, or Equal Protection Clause principles. *See* Idleman, *supra* note 116, at 285-302 (arguing that RFRA's constitutionality under the Establishment Clause "is fundamentally an open question").

Nor do we pause here to examine the constitutionality of the unique provision in Section 3(c) of RFRA, which in its application to raising a RFRA "claim or defense" in judicial proceedings in state courts, asserts: "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution." *See* Asarco Inc. v. Kadish, 490 U.S. 605 (1989); Brian A. Stern, Note, *An Argument Against Imposing the Federal Case or Controversy Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994) (contending that the principles of federalism, as well as the federal separation of powers doctrine underlying the Article III standing requirements, counsel against applying those requirements when state courts adjudicate federal questions).

[278] 42 U.S.C. § 2000bb-3(a) (Supp. V 1993) provides: "This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."

grant of substantive power to Congress. It is merely a grant of enacting power, a power to enact legislation to execute and carry into effect all substantive powers granted by the Constitution to the Congress or other departments of the Federal Government.[279]

This road inevitably leads us back to the historic *McCulloch v. Maryland* end-means-consistency test for evaluating the constitutionality of any enactment stemming from the Necessary and Proper Clause. It is the same test that *Morgan* borrowed for use in testing the validity of enactments stemming from the "little necessary and proper clause," Section 5 of the Fourteenth Amendment. No extended analysis is necessary to conclude that, using the *McCulloch* test, the same violation of the Cooley Principle of Separation that infects RFRA's viability under Section 5 also infects its viability under the Necessary and Proper Clause in Article I.

One additional problem is presented by RFRA's wholesale sweep in amending the United States Code in its entirety. The legislative hearings and the committee reports, let alone the actual language of RFRA, provide not the slightest indication that all uniform federal laws and regulations have been administered in such a way as to burden substantially the religious practices of the public affected by such laws and regulations. And while "Congress need [not] make particularized findings in order to legislate,"[280] the complete absence of findings at any stage of the legislative process may make it exceedingly difficult for the Supreme Court to engage in its "independent evaluation of constitutionality,"[281] while giving due respect to relevant findings of Congress.

Moreover, if we were to accept RFRA's premise that Congress has the power to effectuate changes and restorations in constitutional free exercise doctrines, particularized findings by Congress might be necessary to warrant such a take-over of the Supreme Court's function. If Congress is to assume that role, then perhaps it should explain itself much as the Court does in its opinions.[282]

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[279] This differs from Congress' power to exempt from the scope of any law religious conduct. *See supra* part VI.

[280] Perez v. United States, 402 U.S. 146, 156 (1971).

[281] United States v. Lopez, 115 S. Ct. 1624, 1631 (1995). *See supra* part VI.B.

Professor Hamilton has written: "There can be little doubt that permitting Congress to act in this irresponsible and unconscious manner runs against the well-settled notion that Congress bears responsibility for ensuring the constitutionality of its own enactments." Hamilton, *supra* note 126, at 367.

[282] *See* Choper, *supra* note 185, at 305.

VIII. CONCLUSIONS

The foregoing discussion compels at least three conclusions. First, by its own language and by its repeated expressions of purpose and intent, RFRA must be condemned as an attempt by Congress to invade the judicial arena of constitutional interpretation.[283] Constitutional interpretation, which necessarily involves development of appropriate judicial standards of review, is at the core of the judicial process. It is also at the core of the Supreme Court's function as chief guardian and overseer of the Constitution in the judicial context of deciding cases and controversies arising under the Constitution. And so when Congress intrudes upon this core judicial function, directing the courts to abandon or adopt or restore a particular constitutional interpretation and to follow a standard of judicial review that Congress prefers, the result is a stark violation of the separation of powers doctrine, particularly as expressed by the Cooley Principle of Separation.

The Supreme Court is shorn of its ability to make an independent reading of the Clause and to develop a standard of review that it considers most consistent with that reading. The Court has been enjoined from reading the Clause, as it did in *Smith*, as excluding neutral and generally applicable laws that only incidentally burden religious exercises. Nor is the Court free, if it obeys the RFRA dictates, to reject a balancing or compelling governmental interest test in assessing such a free exercise claim. RFRA injects itself so far into the judicial world as to hobble the Supreme Court's ability to be an independent arbiter of the meaning and application of a constitutional provision. If RFRA is constitutional, the Court cannot then establish any uniform or consistent reading of the Free Exercise Clause, or standard of review, that clashes with what RFRA says. In effect, Congress has said to the Supreme Court, at least in the free exercise context, that "You must never forget that it is our statutory version of the Constitution you are

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283 The express words of RFRA, as well as the uniform expressions of congressional intent, make it impossible to interpret RFRA as anything other than a deliberate and intentional invasion of the judicial power of adjudicating cases and controversies arising under the Constitution. As stated in Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992), "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 253–54 (citation omitted). And when the plain words of RFRA are so consistent with the congressional intent to "overrule *Smith*" and to compel courts, in adjudicating constitutional cases and controversies, to follow what Congress believes is a preferable reading of the Constitution, there is no room for alternative constructions of RFRA to avoid the separation problems.

expounding."[284]

A second conclusion to be drawn from this discussion is that RFRA sets a precedent for future Congresses that aim to undo a result or decision of the Supreme Court which Congress deems an "erroneous" constitutional interpretation. The history of congressional efforts to reverse or isolate some politically unpopular decision of the Court is a long one, filled with a variety of legislative techniques to target and destroy what Congress deems to be an egregiously "wrong" interpretation of some constitutional provision.[285] Most of those techniques have failed, but not RFRA. Because RFRA has become the law of the land, unless invalidated, its technique may well become a model for future congressional forays into the sphere of the judiciary.

One final point: RFRA is a totally unnecessary and unhappy way of addressing the problems created by the *Smith* decision. Apart from creating another constitutional amendment, always a difficult proposition, there are three simple options open to those concerned with the *Smith* impact. First, as *Smith* itself recognizes, Congress and the state legislatures are free to create religious exemptions from any uniform and generally applicable law. Congress and the State of Oregon have done just that with respect to the peyote component of *Smith*—legalizing peyote use in religious ceremonies.[286] As Professor Hamilton has made clear, "[n]o constitutional principle . . . hinders

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[284] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[285] *See* Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965). This article catalogues the various devices used by Congress, over the first 170-year history of the nation, to curb or change some policy or decision of the Supreme Court. Such devices include the attempted impeachment of the Justices (such as happened to Justice Samuel Chase in 1804), efforts to curb or alter the judicial review processes, efforts to change the size of the Court or the qualifications of the Justices, efforts to regulate, define or curb the appellate jurisdiction of the Court over particular matters (such as habeas corpus appeals, abortion, public school integration by way of busing, voluntary school prayer, and Reconstruction Era problems), efforts to repeal the Court's jurisdiction over state courts, and efforts to reduce the contempt and injunction powers of the judiciary and to redraw some of the rules of practice and procedure. Most of these efforts failed. To these devices must be added, of course, the Senate's power to reject nominations to the Court, and congressional efforts to initiate a constitutional amendment to overcome a Court decision. *See also* GUNTHER, *supra* note 252; HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 366–78 (Paul M. Bator et al. eds., 3d ed. 1988); Lawrence G. Sager, *The Supreme Court, 1980 Term—Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18–22 (1981); Mark E. Herrmann, Note, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543 (1992).

[286] *See supra* notes 123–24 and accompanying text.

Congress from pledging to meet the highest ideals of religious liberty through its various exercises of its enumerated powers."[287]

Second, Congress is totally free to create, by statute, a true federal right of action to enforce and protect some specified aspects of religious exercise. Such a free-standing statute can contain its own purposes and its own standards of judicial review and need have no symbiotic relationship to the Free Exercise Clause or its related jurisprudence. Congress does indeed have constitutional power to ratchet up First and Fourteenth Amendment individual rights recognized but perhaps not fully developed by the Supreme Court. Witness the Voting Rights Act of 1965, or the Title VII employment discrimination provisions of the Civil Rights Act of 1964, or the federal Age Discrimination Act—none of which use the RFRA technique of rewriting a constitutional provision and directing the courts to enforce the rewritten version.

Lastly, the most effective solution for those who find the *Smith* decision so distasteful is to ask the Court, in a proper case, to reconsider and overrule the *Smith* reading of the Free Exercise Clause. The dynamics surrounding *Smith* do seem to indicate that the Court might be receptive to such a request. It was, after all, a hotly contested 5-to-4 decision on the basic question of how to read and apply the Clause.[288] And Justice Souter, appointed to the Court after the *Smith* decision, has already invited a re-examination of *Smith*. In his *Hialeah* concurrence, Justice Souter said that, because *Smith* did not overturn any of the pre-*Smith* jurisprudence: "[W]e are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application."[289]

Justice Souter also described *Smith* as having little stare decisis strength because the rule of law it announced was "unnecessary to the outcome of the case, especially one not put into play by the parties, [and thus] approaches without more the sort of '*dicta* . . . which may be followed if sufficiently persuasive but which are not controlling.'"[290]

The author of the *Smith* majority opinion, Justice Scalia, has suggested the

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[287] Hamilton, *supra* note 126, at 369.

[288] One of those joining the 5-person majority in *Smith*, Justice White has since retired. But three of the four dissenters in *Smith* have also retired: Justices Brennan, Marshall, and Blackmun. Of the four new Justices (Souter, Thomas, Ginsburg, and Breyer), only Justice Souter has expressed so much doubt about *Smith* as to call for its re-examination. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2240 (Souter, J., concurring).

[289] *Id.* at at 2243.

[290] *Id.* at 2247 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935)).

same kind of salve for the *Smith* critics: seek reconsideration. Indeed, that suggestion can be taken as a subtle invitation to those critics to petition the Court, in an appropriate case, to revisit and reexamine *Smith*. Speaking before the Supreme Court Historical Society in 1994, Justice Scalia observed that his opinion in *Smith*

> did not form the basis for a private exemption from generally applicable laws governing conduct—so that a person could not claim a right to use a proscribed psychotropic drug (peyote) in religious ceremonies. There again, *the decision on the point was 5–4, making clear to one and all (and to future litigants, in particular) that this is a controverted and thus perhaps changeable portion of our jurisprudence.*[291]

Justice Scalia also put *Smith* in the category of cases where dissents are "most likely to be rewarded with later vindication" and where counsel are emboldened "in later cases to try again, and to urge an overruling—which sometimes, although rarely, occurs."[292]

Unfortunately, the entrance of RFRA into the free exercise jurisprudence may long prolong, if not extinguish, any opportunity to accept these invitations to re-examine and perhaps overrule *Smith*. By commanding the courts to apply the compelling governmental interest test to all free exercise cases involving neutral and generally applicable laws, RFRA not only isolates the *Smith* rule but makes it virtually impossible to create what Justice Souter said is "the next case that would turn upon its [the *Smith* rule's] application." That "next case," the one that might cause a re-examination of *Smith*, may never surface as courts will now be immersed in RFRA-type cases.

In sum, RFRA succeeds only in muddying rather than clearing the

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[291] Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 38 (emphasis added).

[292] *Id.* (footnote omitted). It is at this point in his remarks that Justice Scalia cited three recent instances where the Court had overruled earlier 5-to-4 constitutional rulings: United States v. Dixon, 113 S. Ct. 2849 (1993); Payne v. Tennessee, 501 U.S. 808 (1991); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Scalia, *supra* note 291, at 44 n.2.

In the *Payne* case, Chief Justice Rehnquist wrote that the rule of stare decisis is not an inexorable command, especially in constitutional cases where "'correction through legislative action is practically impossible.'" 501 U.S. at 828 (quoting Burnet v. Coonado Oil & Gas Co., 285 U.S. 393, 407 (Brandeis, J., dissenting)). He then observed that "the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions . . . [some of which] were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts." *Id.* at 828–29.

jurisprudential waters surrounding the Free Exercise Clause. It should be appropriately buried so that the Court can get back to its historic business of interpreting the Constitution in accordance with the principles of *Marbury v. Madison*. And Congress should abandon this ill-conceived attempt to enter the judicial "case or controversy" arena and to dictate how the Free Exercise Clause should be interpreted and applied in that arena.